

Wynkoop v 622A President St. Owners Corp.

2016 NY Slip Op 31156(U)

January 21, 2016

Supreme Court, Kings County

Docket Number: 511492/15

Judge: Francois A. Rivera

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At an IAS Term, Part 52 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 6th day of January, 2015

HONORABLE FRANCOIS A. RIVERA

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BRETT WYNKOOP and KATHLEEN KESKE,

Petitioner(s),
For Judgment Under Article 78 of the Civil Practice Laws and Rules

DECISION & ORDER

Index No. 511492/15

- against -

622A PRESIDENT STREET OWNERS CORP.,

Defendant(s).

-----X

Recitation in accordance with CPLR 2219 (a) of the papers considered on the petition of plaintiffs, Brett Wynkoop and Kathleen Keske, filed on October 6, 2015, under motion sequence number one for an order (1) pursuant to CPLR Article 78 invalidating an election of the Board of Directors, to recount the votes of the shareholders, adding the petitioners' slate of nominees to the ballot and to have their votes counted by plurality with the votes already cast by the other shareholders.

- Notice of petition (verified by counsel)
- Petition
- Affidavit in Support of Brett Wynkoop
- Exhibits A - I
- Affirmation in Opposition.
- Exhibit I

BACKGROUND

There are three related actions that are before this Court. On September 18, 2015, plaintiffs Brett Wynkoop and Kathleen Keske commenced the instant action pursuant to CPLR Article 78, under index number 511492/2015 (hereinafter the instant action), by filing notice of petition and petition with the Kings County Clerk's office. On October 10, 2015, 622A President Street Owners Corp. (hereinafter 622A), Kyle Taylor and Rajeev Subramanyan¹ opposed the petition.

On November 15, 2013, plaintiffs Brett Wynkoop and Kathleen Keske commenced an action for declaratory and injunctive relief, under index number 507156/2013 (hereinafter the declaratory action), by filing a summons and complaint with the Kings County Clerk's office. On December 24, 2013, the defendants Kyle Taylor, Hilary Taylor and Rajeev Subramanyan interposed a joint answer with eight counterclaims. On January 13, 2014, the plaintiffs joined issue by reply to the counterclaims.

On March 26, 2012, Kyle Taylor and Rajeev Subramanyan, shareholders, suing in the right of 622A, commenced a derivative action, under index number 6548/2012 (hereinafter the derivative action), by filing a summons and verified complaint with the Kings County Clerk's office. On or about April 30, 2013, the defendants, Wynkoop,

¹Kyle Taylor and Rajeev Subramanyan are not named defendants in the instant action, however they are defendants in a related action under index number 507156/13.

Koske, and Boreland joined issue. There is no indication that 622A has interposed an answer.

The Honorable David I. Schmidt issued several orders in the declaratory action that are relevant to the instant application. By order dated November 7, 2015, the Hon. David I. Schmidt ordered, among other things, that the shareholders of 622A hold a new special meeting of shareholders to elect a new board within forty days of the date of the order and that a court appointed referee shall notice and act as inspector of the election. By order dated April 20, 2015, the Honorable David I. Schmidt amended the prior order to appoint Jamic Lathrop, Esq. as referee. Subsequently, on May 27, 2015, a shareholders meeting was held. By report dated June 29, 2015, the referee reported that Hilary Taylor, Kyle Taylor and Rajeev Subramanyam were elected to the board of directors. Subsequent to the election the matter was administratively transferred to this Court.

By notice of motion filed on August 7, 2015, under motion sequence number twenty-one, the defendants moved pursuant to CPLR 4403 to confirm the referee's report. The plaintiffs opposed the motion. By order dated September 15, 2015, this Court granted the defendants' motion to confirm the referee's report.

By notice of motion filed on September 30, 2015, under motion sequence number twenty-three, the plaintiffs moved pursuant to CPLR 3212 for an order, among other things (1) granting summary judgment in their favor and dismissing the counterclaims and

(2) vacating all injunctions.

By notice of motion filed on October 15, 2015, under motion sequence number twenty-four, the plaintiffs moved pursuant to CPLR 2221 to renew and reargue their opposition to the defendants' motion to confirm the referee's report. By order dated December 3, 2015, this Court ordered, among other things, that motion number twenty-three and twenty-four are held in abeyance until the completion of a trial on motion sequence number fifteen which sought contempt against the plaintiffs.

LAW AND APPLICATION

Article 78 of the CPLR establishes the procedure for challenging determinations of administrative agencies, public bodies or officers (*see* CPLR 7802 (a); *Luczaj v Bortnik*, 91AD3d 872, 873 [2nd Dept 2012]). Under the common law, procedure for relief was obtained by procedures under writs of certiorari, prohibition or mandamus. Distinctions between these procedures are no longer important, but are still relevant for analyzing Article 78 proceedings.

The petitioner in this case is not seeking a judicial review, which would be appropriate under writ of certiorari, or to prohibit a specific action, which would be appropriate under writ of prohibition (*see generally*, Vincent C. Alexander, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR, CC7801:2 and C7801:4). Rather he seeks mandamus to compel through a "judicial command to an officer or body to perform a specified ministerial act that is required by law to be

performed” (see *Brownlee v Kohm*, 61 AD3d 972, 973 [2nd Dept 2009]). CPLR 7803 (1) mirrors a mandamus to compel and allows the petitioner to review “whether the body or officer failed to perform a duty enjoined upon it by law” (see CPLR 7803 (1); *Klein v New York State Office of Temp. & Disability Assistance*, 84 AD3d 1378, 1380 [2nd Dept 2011]).

The petitioner seeks an order invalidating an election of the Board of Directors, to recount the votes of the shareholders, adding the petitioner’s slate of nominees to the ballot and to have their votes counted by plurality with the votes already cast by the other shareholders. Petitioners allege that they are entitled to this relief because the court appointed special referee exceeded his authority during a meeting held on May 27, 2015.

The Second Department noted that the remedy of mandamus to compel “may be granted only if petitioner establishes a clear legal right to the relief requested” (*Rozz v. Nassau County Dept. of Assessment*, 96 AD3d 952 [2nd Dept 2012]). The Court must apply this standard to all the petitioner’s requests. Mandamus to compel is appropriate only where the right to relief is clear and the action sought to be compelled is an act commanded to be performed by law involving no exercise of discretion (see generally, *Matter of Korn v Gulotta*, 72 NY2d 363 [1988]). Mandamus is addressed to the discretion of the court (*County of Albany v Connors*, 300 AD2d 902 [3rd Dept 2002]).

The instant petition seeks the same relief requested in the petitioner’s motion to renew and reargue brought in the declaratory action. As the motion to renew and reargue

has been stayed until the hearing on contempt is completed, the instant motion is held in abeyance pending the outcome of the contempt hearing and a determination on the motion to renew and reargue.

The foregoing constitutes the decision and order of this Court.

Enter:

Francois A. Rivera
J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.

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