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| Matter of Brown v Pacifica Found., Inc. |
| 2016 NY Slip Op 32218(U) |
| October 31, 2016 |
| Supreme Court, Kings County |
| Docket Number: 503620/16 |
| Judge: Lawrence S. Knipel |
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At an IAS Term, Commercial Part 4 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 31st day of October, 2016.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

-----X

In the Matter of the Application of

STEVE BROWN and ROBERT YOUNG,
Petitioners,

- against -

THE PACIFICA FOUNDATION, INC.,
Respondent.

-----X

DECISION AND JUDGMENT

Index No. 503620/16

Mot. Seq. #1

The following e-filed papers read herein:

NYSCEF #

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|---|---------------|
| Order to Show Cause, Petition, Affidavits (Affirmations) and Exhibits Annexed _____ | <u>1-2, 5</u> |
| Affidavits (Affirmations) in Opposition and Exhibits Annexed _____ | <u>9, 11</u> |
| Reply Affidavits (Affirmations) and Exhibits Annexed _____ | <u>10</u> |
| Surreply Affidavits (Affirmations) and Exhibits Annexed _____ | <u>12</u> |

Background

The respondent The Pacifica Foundation, Inc. (Pacifica) is a national charitable not-for-profit corporation organized under California law. It owns and operates five radio stations, including WBAI 99.5 FM in New York City (WBAI). Pacifica is governed by a board of directors, known as the National Board, the majority of which is elected by the delegates from each radio station. Pacifica's bylaws govern the election of delegates from its radio stations.

On May 7, 2015, the National Board amended Pacifica's bylaws to change the timing of annual elections of delegates, including those from WBAI. On January 26, 2016, WBAI held an annual election of its delegates. At that election, nonparty Kathryn Davis was elected to replace nonparty Janet Coleman as one of the WBAI delegates; in addition, the petitioner Robert Young, together with three other individuals (all nonparties hereto), were elected as the WBAI delegates. On January 28, 2016, Pacifica, relying on its May 7, 2015 amendment to its bylaws, informed WBAI that its January 26, 2016 election was invalid for lack of a quorum and, thereupon, declined to recognize Ms. Davis, the petitioner Young, and the other newly elected delegates at WBAI. In the same communication, Pacifica advised WBAI that (1) Ms. Davis could not fill Ms. Coleman's vacancy as a WBAI delegate; (2) nonparty Vajra Kilgour had filled Ms. Coleman's vacancy as a WBAI delegate; and (3) WBAI was to hold another delegate election on February 20, 2016. The record before the Court is unclear whether WBAI held another election on that date or at any time thereafter.

On March 14, 2016, this special proceeding was commenced by order to show cause, seeking to compel Pacifica to recognize the results of WBAI's January 26, 2016 election and to invalidate the National Board's May 7, 2015 amendment of Pacifica's bylaws. The petition is supported by (1) the affidavit of the petitioner Young,¹ (2) the attorney affirmation, (3) the National Board's resolution reflecting the amendment of Pacifica's bylaws, and

¹ The other petitioner is Steve Brown who was (and still is) a WBAI delegate, and his position as such was not affected by the bylaws amendment at issue. The petitioner Brown was absent from the May 7, 2015 meeting of the National Board at which the amendment at issue was passed. Although named in the petition, Mr. Brown has submitted no affidavit at any stage of this proceeding. Mr. Brown first appeared when, apparently unable to get in contact with the petitioners' counsel, he sent an ex parte, unsworn letter to the Court, dated October 10, 2016. The Court, in rendering this decision, has not considered Mr. Brown's letter.

(4) the excerpts from Pacifica's bylaws. The opposition consists, principally, of attorney affirmations and the excerpts from Pacifica's bylaws.

Disposition

New York Not-For-Profit Corporation Law (NPCL) § 618 provides that:

“Upon the petition of any member aggrieved by an election and upon notice to the persons declared elected thereat, the *corporation* and such other persons as the court may direct, the supreme court at a special term held within the judicial district where the office of the *corporation* is located 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).²

Article 13 of the NPCL establishes the process by which a foreign not-for-profit corporation, like Pacifica, may obtain authorization to conduct business in New York, and further specifies its powers, duties, and liabilities. Section 1320 of Article 13 of the NPCL provides:

“In addition[] to articles 1 (Short title; definitions; application; certificates; miscellaneous)[] and 3 (Corporate name and service of process)[] and the other sections of article 13, *the following provisions, to the extent provided therein, shall apply to a foreign corporation conducting activities in this state, its directors, officers and members:*

(1) *Section 623 (Members' derivative action brought in the right of the corporation to procure a judgment in its favor).*

(2) *Sections 721 (Exclusivity of statutory provisions for indemnification of directors and officers) through 727 (Insurance for indemnification of directors and officers), inclusive.*

² The counterpart to NPCL § 618 is New York Business Corporation Law (BCL) § 619, which applies to for-profit corporations. Contrary to the petitioners' contention, BCL § 619 is irrelevant because, among other things, Pacifica is a not-for-profit corporation.

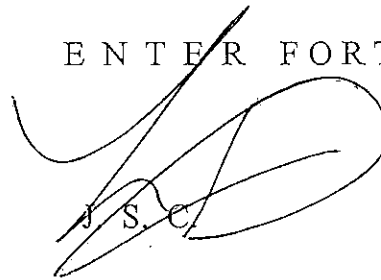
[*4] (3) Section 906 (Merger or consolidation of domestic and foreign corporations)” (emphasis added).

Noticeably absent from NPCL § 1320 is any reference to NPCL § 618. Indeed, Section 1320 makes only one other provision of Article 6 applicable to foreign not-for-profit corporations, but not NPCL § 618. This confirms that NPCL § 618, read in light of the definition of “not-for-profit corporation” set forth in NPCL § 102 (a) (5),³ applies only to *domestic* not-for-profit corporations. Because Pacifica is a California corporation, NPCL § 618 is inapplicable.⁴

Inasmuch as the petition is premised, in its entirety, on the erroneous assumption that the controversy is governed by New York Business Corporation Law, rather than by the California Corporations Code, the petition is defective, and Pacifica’s objection to the petition is sustained. The petition is dismissed without prejudice and without costs or disbursements.

The constitutes the Decision and Judgment of the Court.

ENTER FORTHWITH,

A handwritten signature in black ink, appearing to read 'L. Knipel', is written over the typed name 'J. S. C.' and the title 'HON. LAWRENCE KNIPEL'.

HON. LAWRENCE KNIPEL

³ NPCL § 102 (a) (5) defines a “corporation” or “domestic corporation” as “a corporation (1) formed under this chapter, or existing on its effective date[] and theretofore formed under any other general statute or by any special act of this state, exclusively for a purpose or purposes, not for pecuniary profit or financial gain, for which a corporation may be formed under this chapter, and (2) no part of the assets, income or profit of which is distributable to, or enures to the benefit of, its members, directors or officers except to the extent permitted under this statute.”

⁴ Nothing in the record indicates that WBAI – the New York-based radio station owned by Pacifica – is a New York corporation.