

**Matter of Kaiser v Horizon Condominium Bd. of
Mgrs.**

2017 NY Slip Op 31746(U)

June 22, 2017

Supreme Court, New York County

Docket Number: 162935/2015

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 46

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In the Matter of the Application of

SHARON KAISER and ALYSSA J. HELD-HONIG,

Index No. 162935/2015

Petitioners

- against -

DECISION AND ORDER

HORIZON CONDOMINIUM BOARD OF MANAGERS,
HORIZON CONDOMINIUM ASSOCIATION,
VOTING GROUP, LLC, and MAXWELL KATES,
INC.,

Respondents

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LUCY BILLINGS, J.S.C.:

This proceeding challenges whether a quorum appeared for a meeting of respondents residential condominium association and its board of managers December 14, 2015, and whether all votes for two positions on the board were counted accurately. The disclosure to which the parties stipulated, see C.P.L.R. § 408, now shows that a quorum did appear, and enough votes were counted accurately so that any votes not counted or not accurately recorded would not affect the outcome of the election.

The managing member of respondent Voting Group, LLC, which the condominium respondents and their managing agent respondent Maxwell Kates, Inc., retained to administer the election, shows through his affidavit and records that owners of 144 condominium units appeared for the meeting in person or by proxy. This number is more than the owners of one third of the 411 units required by the condominium's by-laws for a quorum. Aff. in

Opp'n of Jared Kasper Ex. G., art. II, § 3. The appearances by proxy included owners of 26 units who mailed back absentee ballots that the Voting Group had mailed to the owners.

Only 134 votes of the 144 owners actually were counted, either because the owners did not vote, or because their votes were voided. One of the owners who appeared in person did not vote. Among the 26 mailed absentee ballots, six were voided. Among the 26 additional votes by proxy, three were voided. Petitioners do not challenge the reasons why the Voting Group voided these nine votes: because the voters voted for no candidates or more than two candidates, did not use the approved voting form, or did not sign the ballot or the signature on the ballot did not match the unit owner.

The two winning candidates received 77 and 72 votes. The two petitioners received 49 and 45 votes. Therefore a minimum of 23 votes must have been erroneously voided or erroneously not counted to affect the outcome of the election. Petitioners do not claim that respondents inaccurately recorded votes for petitioners as votes for the winners. Had the voided votes been counted, however, petitioner Kaiser would have received only one of those votes, petitioner Held-Honig would have received none, and the margin between Kaiser's votes and the winners' votes only would have increased.

Petitioners contend that owners of three units did not receive their ballots in the mail in time to mail them back before the meeting, and owners of four units received the ballots

that the owners had mailed to respondents returned to the owners in the mail. One of the three and two of the four, however, appeared in person and cast votes that were counted at the meeting, leaving a total of only four whose votes were not counted due to the mailing process.

Petitioners also contend that owners of 12 additional units who claim they mailed back ballots do not appear on respondents' list of persons whose votes were counted, voided, or not received back in the mail. No admissible evidence, however, supports this contention. C.P.L.R. §§ 403(b), 409(b); Gonzalez v. City of New York, 127 A.D.3d 632, 633 (1st Dep't 2015); 10 W. 66th St. Corp. v. New York State Div. of Hous. & Community Renewal, 184 A.D.2d 143, 148 (1st Dep't 1992). See Thompson v. Cooper, 91 A.D.3d 461, 462 (1st Dep't 2012); 1091 Riv. Ave. LLC v. Platinum Capital Partners, 82 A.D.3d 404, 404 (1st Dep't 2011); Karr v. Black, 55 A.D.3d 82, 86 (1st Dep't 2008); Chadbourne & Parke, LLP v. AB Recur Finans, 18 A.D.3d 222, 222 (1st Dep't 2005). Petitioner Kaiser simply attests that she contacted these owners, and they reported to Kaiser their experiences; Kaiser does not indicate that she observed these owners mailing their ballots to respondents. See McGinley v. Mystic W. Realty Corp., 117 A.D.3d 504, 505 (1st Dep't 2014); Acevedo v. Williams Scotsman, Inc., 116 A.D.3d 416, 417 (1st Dep't 2014); Mermelstein v. Singer, 85 A.D.3d 440, 440 (1st Dep't 2011); Wen Ying Ji v. Rockrose Dev. Corp., 34 A.D.3d 253, 254 (1st Dep't 2006).

Even if the court considered this hearsay evidence, however,

it would not change the outcome. Assuming both that respondents are to be held accountable for the four votes not counted due to the mailing process and that respondents erroneously failed to count the 12 votes that Kaiser describes, these 16 votes do not amount to the 23 needed to affect the outcome of the election.

Consequently, the evidence amply establishes that enough votes were counted accurately so that any votes erroneously voided or erroneously not counted would not affect the outcome of the election. C.P.L.R. § 7803(3). The court therefore denies the petition and dismisses this proceeding. C.P.L.R. § 7806.

DATED: June 22, 2017

Lucy Billings

LUCY BILLINGS, J.S.C.
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J.S.C.