

Margules v Haies
2018 NY Slip Op 31109(U)
May 24, 2018
Supreme Court, Kings County
Docket Number: 522250/2017
Judge: Sylvia G. Ash
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At an IAS Term, Comm-11 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 24th day of May, 2018.

P R E S E N T:

HON. SYLVIA G. ASH,

Justice.

RUBIN MARGULES, as an individual member
of the Board of Governors of Manhattan Beach
Jewish Center and as a Member of the Manhattan
Beach Jewish Center,

Plaintiff,

- against -

JAY HAIES, individually and as Chairman of the
Board of Governors of Manhattan Beach Jewish
Center, MILTON ZEGERMAN, individually and as
President of the Board of Governors of Manhattan
Beach Jewish Center,

Defendants.

The following papers numbered 1 to 16 read herein:

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed _____

Opposing Affidavits (Affirmations) _____

Reply Affidavits (Affirmations) _____

Other Papers _____

DECISION AND ORDER

Index # 522250/2017

Mot. Seq. 1, 2

Papers Numbered

1-4

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12-14

15, 16

Plaintiff, Rubin Margules, brings the instant order to show cause seeking a temporary restraining order ("TRO") and preliminary injunction enjoining Defendants, JAY HAIES ("Haies") and MILTON ZEGERMAN ("Zegerman"), from scheduling and holding elections for the Board of Governors ("Board") of the Manhattan Beach Jewish Center ("MBJC") pending determination of the validity of Plaintiff's nominating petition which was rejected by Defendants. Defendants move to dismiss Plaintiff's complaint on various grounds. On November 16, 2017, this Court granted Plaintiff's application for a TRO pending determination of his motion. Plaintiff filed a second order to show cause on or around December 17, 2017 (motion sequence 3), seeking to compel Defendants to hold a special meeting of the membership of MBJC, which motion was granted by short form order dated January 3, 2018.

Plaintiff is a member of MBJC, a religious corporation that has been in existence since 1922 and which is located at 60 West End Avenue in Brooklyn, New York. Haies is the current chairman and Zegerman is the current president of the Board of MBJC. According to Plaintiff's complaint, on October 27, 2017, Plaintiff hand-delivered a written petition proposing an alternate slate of candidates for MBJC's Board of Governors to Haies and Zegerman at MBJC's offices. Plaintiff further alleges that his nominating petition, which was signed by 36 members in good standing, meets all of the requirements of MBJC's bylaws¹ but that based on "Defendants' strong recommendations, the Board of Governors rejected the October 27, 2017 nominating [p]etition" (Complaint, Paragraph 40).

On or around November 15, 2017, Plaintiff commenced this action alleging violations of sections 5 and 200 of the Religious Corporations Law and section 717 of the Non-Profit Corporation Law ("N-PCL"). Simultaneously with the summons and complaint, Plaintiff filed the instant order to show cause which, in addition to the aforementioned preliminary injunction, seeks a finding from the Court that Defendants' rejection of Plaintiff's nominating petition was arbitrary and capricious and that Plaintiff's nominating petition be deemed valid.

In opposition to Plaintiff's preliminary injunction application, Defendants argue that they were not properly served because the individual served with process at the offices of MBJC, Mr. Litman, was not authorized to accept service on behalf of Zegerman or Haies, and further, that Defendants did not receive the papers via mail. Secondly, Defendants contend that Plaintiff cannot establish likelihood of success with regards to his petition because his petition was properly rejected due to numerous irregularities. Specifically, that Plaintiff submitted a copy of a petition which was cut and pasted together, which had signatures that did not appear to be genuine, and which improperly sought to elect a non-member, Jack Mikulincer, as an officer in violation of MBJC's bylaws.

Defendants also move to dismiss Plaintiff's complaint on the following grounds: (1) that Plaintiff wrongfully commenced a plenary action instead of a special proceeding under section 618

¹ Article VI Section 4 of MBJC's bylaws provides: "All elected officers and members of the Standing Committees and Boards must be in good standing before assuming office."

Amendment of Article VI Section C provides: "Within 10 days after the publication of the slate in the Hashofar, independent nominations of qualified members to hold office may be made by written petition to the President of the congregation and signed by at least 25 members of the MBJC in good standing containing the following information: (1) the full name and address of each signatory; (2) the full name and address of each candidate nominated; and (3) the particular office for which each candidate is nominated. Any petition which fails to comply with the requirements of this sub-section shall be totally void."

of the N-PCL; (2) Plaintiff impermissibly mixes derivative and individual claims in his complaint by seeking, in his individual capacity, damages in the amount of \$100,000 while also seeking to compel a certain action related to elections as a board member; (3) the Board of MBJC is a necessary party as Plaintiff seeks to challenge a Board decision and the two members sued herein cannot overturn or change the Board's vote; and (4) Plaintiff fails to state an action because his allegations of bad faith are unfounded as it is undisputed that Plaintiff's nomination petition was rejected after a meeting and vote by the Board.

In opposition to Defendants' motion to dismiss, Plaintiff contends that this action was properly commenced via a summons and complaint because Plaintiff is not challenging the results of an election, but rather, is seeking pre-election relief that is solely within the purview of Zegerman and Haies, as the leaders of the Board. Along the same vein, Plaintiff argues that the Board is not a necessary party because Plaintiff is not challenging a Board decision because the issue of the validity of his petition should never have been submitted to the Board pursuant to the bylaws. Rather, Plaintiff submits that his complaint is against Zegerman for breach of his fiduciary duty in failing to comply with the bylaws which mandate that Zegerman accept a "written petition to the President of the Congregation and signed by at least 25 members of the [Congregation] in good standing" and against Haies for acting with Zegerman in rejecting Plaintiff's nominating petition and improperly placing before the Board the issue of whether to permit or reject the nominating petition.

With regards to Defendants' allegation that Plaintiff improperly mixed derivative claims with individual claims, Plaintiff argues that this can only serve as a basis for dismissal where the Court cannot untangle the direct from the derivative claims. Further, that to the extent Plaintiff's complaint reads as seeking compensatory damages, that such claims are withdrawn.

Plaintiff also submits that Defendants were validly served at their home address on December 8, 2017 and December 13, 2017, when Plaintiff retained a second process serving company to re-serve Defendants. Additionally, that Defendants have waived any arguments as to defective service by appearing on the return date of the motion, requesting an adjournment and consenting to the continuation of the TRO without challenging personal jurisdiction.

Plaintiff also contends that Defendants' reasons for rejecting the nominating petition are either factually inaccurate or not required by MJBC's bylaws. For example, that original signatures on the nominating petition are not required under the bylaws. Further, even if one of the eleven congregants seeking office in Plaintiff's nominating petition is not a member in good standing, that Defendants are not precluded from permitting the other ten candidates to run for office.

Upon review of the parties' submissions, the Court finds that Defendants were validly served on the second attempt. However, Plaintiff's motion for a preliminary injunction enjoining Haies and Zegerman from holding elections pending determination of the validity of Plaintiff's alternate slate must be denied as Plaintiff cannot show a likelihood of success on the merits. Although Plaintiff contends that Defendants' rejection of Plaintiff's nominating petition was arbitrary and capricious and in violation of MBJC's bylaws, the Court finds that, insofar as Plaintiff's petition was rejected because one of the proposed officers, Jack Mikulincer, was not a MBJC member, the rejection of Plaintiff's petition was proper under Article VI Section C of MBJC's bylaws. Plaintiff's position that Defendants should have accepted Plaintiff's petition without Jack Mikulincer and allowed the remaining ten candidates to run for office is contrary to MBJC's bylaws which clearly provide that "[a]ny *petition* which fails to comply with the requirements of this sub-section shall be totally void [emphasis added]." And it is undisputed that one of the requirements for the nomination and election of officers is that proposed officers must be MBJC members in good standing. Plaintiff fails to present any arguments or evidence that the Court should not enforce the bylaws as written or that Defendants waived their right to enforce the bylaws for any reason. Nor does Plaintiff provide any legal support for the proposition that the Court has the discretion to overlook compliance with the bylaws.

To the extent that Defendants raise other arguments for rejecting Plaintiff's petition, the Court finds Defendants' other reasons to be unsupported by the bylaws.

Based upon this Court's finding that Defendants properly rejected Plaintiff's petition for the sole reason outlined above, Defendants' motion to dismiss Plaintiff's complaint must be granted.

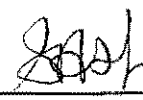
Accordingly it is hereby

ORDERED that Plaintiff's motion for a preliminary injunction is denied and the temporary restraining order previously granted on November 16, 2017 is hereby lifted and vacated; and it is further

ORDERED that Defendants' motion to dismiss Plaintiff's complaint is granted.

This constitutes the Decision and Order of this Court.

ENTER,



Sylvia G. Ash, J.S.C.

2018 MAY 31 AM 9:16

KINGS COUNTY CLERK
FILED