

**Cierkosz v Board of Directors of Dobra Polska
Szkoła Found. Inc.**

2019 NY Slip Op 30275(U)

February 7, 2019

Supreme Court, Queens County

Docket Number: 6770/18

Judge: Allan B. Weiss

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Short Form Order/Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS

IA PART 2

ANDRZEJ CIERKOSZ,

Index No.: 6770/18

Plaintiff,

Motion Date: 10/3/18

THE BOARD OF DIRECTORS OF DOBRA
POLSKA SZKOLA FOUNDATION INC.,
MARTA KUSTEK and DANUTA SWIATEK,

Motion Seq. No.: 1

Defendants.

x

The following papers read on this Article 78 proceeding by petitioner Andrzej Cierkosz for a judgment declaring that the decision, if any, by respondent The Board of Directors of Dobra Polska Szkola Foundation Inc. (Board) to terminate petitioner's position from the Board was ultra vires and therefore null and void ab initio; restoring petitioner to his active role as president and treasurer of the Board; enjoining the other members of the Board from excluding him from the business activities of the Board; enjoining respondent Board or its members from taking any other actions inconsistent with the bylaws; and enjoining the Board or its members from taking any other retaliatory actions against petitioner.

	Papers Numbered
Emergency Order to Show Cause-Affirmation-Affidavit- Verified Petition-Exhibits.....	1-6
Affidavits of Service.....	7-8
Verified Answer.....	9-10
Opposing Affirmation.....	11
Opposing Affirmation-Exhibits.....	12- 14
Reply Affirmation-Affidavit of Service.....	15-16

Upon the foregoing papers the petition is determined as follows:

The Dobra Polska Foundation Inc. (Foundation), a not-for-profit corporation was

incorporated on December 21, 2010. Its certificate of incorporation states that its purpose is to “create bigger awareness in Polish society in USA of the importance of their Polish education and create financial support for Polish language weekend schools” and that an important activity of said corporation is to “create communication platform for the Polish teachers, parents, students, education professionals and media”. The initial directors named in the certificate of incorporation are Andrzej Cierkosz, Magdalena Olejnik and Tomasz Kustek.

According to an undated document identified by both petitioner and respondents as the Foundation’s bylaws, the Board of Directors are Andrzej Cierkosz President and Treasurer, Magdalena Olejnik Vice-President, and Tomasz Kustek, Executive Secretary. The bylaws provide that the Foundation shall be managed by the Board of Directors; that there shall be at least three but not more than nine directors; and provides for the election of directors who serve for a one year term; and for the removal of directors. The bylaws also provide for an Executive Committee consisting of the President, any Vice Presidents, Secretary and Treasurer, and sets forth the manner in the Executive Committee meets and its duties.

Petitioner Andrzej Cierkosz commenced the within Article 78 proceeding on August 30, 2018, and alleges in his petition that he was unilaterally removed from his position as President and Treasurer of the Foundation after respondent Marta Kustek unilaterally and unlawfully gave herself control over the organization without a vote held by the membership. Petitioner alleges that he has sought to remedy these actions but has been shut out by the Board of Directors, and seeks to ensure that the Board of Directors act in accordance with the Foundation’s bylaws and “other rules constraining its authority”.

The petition alleges that pursuant to the Certificate of Incorporation, petitioner was the Foundation’s President and co-founder, and that since the Foundation’s inception and until 2018 he has served as its president and treasurer; that as a co-founder of the Foundation, he is also a member; that since its inception, no formal elections have taken place and therefore he has remained as president, with other members of the Board changing periodically. The petition alleges that in April 2018, petitioner was informed by the Foundation’s bank that he no longer had access to its account; that a “new Board of Directors” had control over the Foundation’s account; and that Marta Kustek and Danuta Swiatek had changed the account holders to their names and removed his name, without his knowledge.

The petition alleges that petitioner was removed from his “office” without a vote by the Board; that Ms. Kustek declared herself a Board member and its president and that Ms. Swiatek declared herself an executive director and Board member; that petitioner never

received notice of any special or regular meeting of the Board or of the membership, in order to effectuate his removal from the Board; that he was never given an opportunity to hear any charges against him, and was never presented with any reason as why he was removed from the Board; and was never granted a formal hearing as to whether he was removed for just cause, pursuant to the bylaws. He also alleges that he never submitted a waiver of notice for any purported special meeting of the Board.

The petition's first cause of action alleges that the respondents acted contrary to the terms of the Foundation's bylaws, and therefore they lacked the authority to termination his position on the Board of Directors. Petitioner seeks a judgment annulling the purported termination of his position on the Board, and to enjoin respondent from taking any further retaliatory action or other actions inconsistent with the bylaws against petitioner.

The second cause of action alleges that respondent's decision to termination his position on the Board was arbitrary and capricious, and an abuse of discretion, and therefore should be annulled, and respondent should be enjoined from taking any further retaliatory action or other actions inconsistent with the bylaws against petitioner.

The third cause of action alleges that pursuant to the bylaws, respondent was required to give petitioner at least two days advance notice of any special meeting; that he was never given such notice or an opportunity to oppose such an ousting; and that respondent lacked the authority to remove him from the Board. Petitioner seeks an injunction, enjoining respondent from removing from the Board.

Respondents, in their verified answer, have interposed eight affirmative defenses and counterclaims for conversion, unjust enrichment and for declaratory judgment. Petitioner has not served a reply to the counterclaims.

Respondents in their verified answer allege that Maria Kutek is married to the petitioner and that the parties have been estranged since April 2016. It is alleged that Ms. Kutek and Ms. Swiatek, as well as others, have engaged in various activities on behalf of the Foundation; that since Ms. Kutek and Mr. Cierkosz separated, he has become increasingly hostile to her, and to the other Board members; and that he has refused to meet with her and the other Board members, and essentially has been engaging in his own projects and activities on behalf of the Foundation, without communicating with anyone else. It is alleged that in early 2018, Ms. Kutek sought to obtain a grant on behalf of the Foundation from the Polish government; that in March 2018 she was informed that the Foundation had been awarded a grant; and that she was required to provide the Polish government with certain information regarding the Foundation's bank account, so that the funds could be wired to the said account. It is alleged that in early March 2018, Ms. Kutek discovered that petitioner had

closed the Foundation's account with the Polish and Slavic Federal Credit Union, located in Greenpoint, Brooklyn; that all funds had been removed; and that Cierkosz had opened a new account with a Chase bank, making himself the sole authorized signer.

Respondents allege that as petitioner would not communicate or meet with Ms. Kutek, despite her requests for an urgent Board meeting, and it was necessary to hold a special meeting without petitioner. It is alleged that petitioner was on notice through various voice messages left by Ms. Kutek that respondents intended to hold a special meeting and that he refused to respond to said messages, and that on March 15, 2018, Board members Magdalena Olejnik, Tomasz Kustek (via skype) and Danuta Swiatek met with Ms. Kustek, at which time they discussed the closing of the Foundation's bank account, the fact that the monies were in jeopardy, and Cierkosz' failure to communicate with the Board members. The Board members voted to remove Cierkosz' from the office of president, effectively immediately; voted for Maria Kustek to replace him as president; and to immediately open a new account for the Foundation with the Polish & Slavic Federal Credit Union, so that the grant funds could be deposited. It is further alleged that although respondents sought to resolve matters amicably, Cierkosz remained hostile to them, and has continued to hold himself out as president of the Foundation.

In opposition to the within petition and motion for injunctive relief, respondents have submitted a copy of the minutes of the meeting held on March 15, 2018, memorializing the vote taken by the three other Board members to remove Andrzej Cierkosz from his position as president; appointing Marta Kustek as president; and authorizing the opening of the new bank account on behalf of the Foundation.

At the outset, the "purpose of a preliminary injunction is to preserve the status quo pending a trial" and "the remedy is considered a drastic one, which should be used sparingly" (*Trump on the Ocean, LLC v Ash*, 81 AD3d 713 [2nd Dept 2011]). "As a general rule, the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court." (*Id.*; *Doe v Axelrod*, 73 NY2d 748 [1988]). "In exercising that discretion, the Supreme Court must determine if the moving party has established: (1) a likelihood of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of the injunction." (*Trump on the Ocean, LLC v Ash*, 81 AD3d 713, 715 [2nd Dept 2011]; *Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]; *W. T. Grant Co. v Srogi*, 52 NY2d 496[1981]). In order to obtain a permanent injunction, the moving party must establish that there was a "violation of a right presently occurring, or threatened and imminent," that he or she has no adequate remedy at law, that serious and irreparable harm will result absent the injunction, and that the equities are balanced in his or her favor (*Caruso v Bumgarner*, 120 AD3d 1174, 1175 [2d Dept 2014]; *Elow v Svenningsen*, 58 AD3d 674, 675 [2d Dept 2009]).

To the extent that petitioner seeks a preliminary injunction, such relief is inappropriate here, as it would grant petitioner the ultimate relief he seeks in his petition (*see SportsChannel Am. Assocs. v Natl. Hockey League*, 186 AD2d 417 [1st Dept 1992]).

“ [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]; *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]). Such circumstances do not exist here.

The scope of judicial review in a proceeding pursuant to CPLR Article 78 is limited to the issue of whether the administrative action has a rational basis for its determination (*see Matter of Pell v Board of Educ.*, 34 NY2d 222, 230-231 [1974]). “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts” (*Matter of Murphy v New York State Div. of Hous. & Community Renewal*, 21 NY3d 649, 652 [2013] [internal quotation marks omitted]; *see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231). Once the court finds a rational basis exists for the determination, its review is ended (*Matter of Sullivan County Harness Racing Assoc., Inc. v Glasser*, 30 NY2d 269, 277-278 [1972]).

Paragraph 10 (a) of the Foundation’s bylaws provide for an Executive Committee consisting of the President, Vice Presidents, Secretary and Treasurer. Paragraphs (b) and (c) of the bylaws set forth the powers of the Executive Committee. The Foundation’s bylaws do not specify the functions to be performed by each member of the Executive Committee, and do not state whether these officers are to be elected or appointed by the Board, or elected by the members of the Foundation. Although the Foundation’s bylaws provide for the removal or resignation of a director, the bylaws make no provision for the removal of an officer who serves on its Executive Committee. Removal of an officer of the Foundation therefore is governed by the provisions of Not-For-Profit Corporation Law §714. It is noted that the bylaws do not make any reference to members, and there is no evidence that the Foundation has members, or voting members.

This court, however, need not determine whether petitioner was improperly removed from the office of President. The petition on its face only alleges that petitioner was removed from his position on the Board of Directors. The petition does not allege that petitioner was removed from the offices President and Treasurer, or that he was removed from the Foundation’s Executive Committee. In addition, the documentary evidence submitted herein fails to establish that petitioner was removed from the Foundation’s Board of Directors, or that he was removed from the office of Treasurer on March 15, 2018.

In view of the fact that petition only seeks judicial review of petitioner's alleged removal from the Foundation's Board of Directors, and as there is no evidence that petitioner has been removed from said Board, the relief requested in the petition is not available. To the extent that petitioner states in affidavit that he was improperly removed from his position as President and Treasurer of the Foundation, the court declines to rewrite the petition in order to incorporate said allegations.

Accordingly, as there is no evidence that petitioner was removed from the Board of Directors, petitioner's request for judicial review and for injunctive relief is denied, and the petition is dismissed. Respondents' plenary counterclaims for conversion, unjust enrichment and for declaratory judgment, are hereby severed.

This constitutes the JUDGMENT and ORDER of this court.

Dated: February 7, 2019

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J.S.C.