

Perelshtein v Dykhne
2019 NY Slip Op 33822(U)
December 30, 2019
Supreme Court, Kings County
Docket Number: 509136/2019
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.: 509136/2019
Motion Date: 10-7-19

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DMITRIY PERELSHTEIN, SERGEY NOMEROVSKY,
JOSEPH LORIA, OLEG KRAYETS, SOLOMON
EVDAEV, Shareholders of Senate Apartments Inc., suing
in the Right of Senate Apartments Inc.,

Petitioners,

For a judgment Pursuant to Article 78 of the New York
Civil Practice Law and Rules,

DECISION/ORDER

-against-

EGLE DYKHNE, ELAINE CAPUTI RAY, ILYA
ZELIKOV, MENDY REICHMAN, KEVIN
GERSHENON, SANDY OCASIO, the BOARD OF
DIRECTORS OF SENATE APARTMENTS INC., and
SENATE APARTMENTS INC.,

Respondents.
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The following papers numbered 1 to 8 were read on this Petition:

Papers:	Numbered:
Order to Show Cause/Verified Petition.....	1-2
Petitioner' Memorandum of Law.....	3
Affirmations/Affidavits/in Opposition.....	4-5
Petitioner's Reply Memorandum of Law.....	6
Reply to Petitioner's Supplemental Brief.....	7
Respondent's Supplemental Brief.....	8

Upon the foregoing papers, the motion is decided as follows:

The petitioners commenced this proceeding pursuant to CPLR Article 78 for judgment (I)
compelling and directing the Respondents to call for and hold a special meeting of shareholders,
for the purpose of the shareholders considering the removal of five members of the Board of

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Directors of Senate Apartments Inc. (“the Board”); (ii) compelling and directing the Respondents to call for and hold the special meeting within one (1) month from entry of the Court’s decision on this proceeding and allowing the shareholders in attendance may vote by person or proxy; (iii) enjoining and restraining the Board from holding an election of directors until the annual shareholders’ meeting, to be held in 2020 pursuant to the Corporation’s By-laws; (iv) declaring, directing and ordering that Respondents reimburse and/or pay Petitioners’ attorney’s fees, costs, and disbursements associated with this proceeding pursuant to Business Corporation Law § 626(e); and (v) granting such other and further relief as the Court deems just and proper.

On March 5, 2019, pursuant to Article II, Section 2 of the By-laws of Senate Apartments Inc., the petitioners presented a petition to the Board calling for a special meeting of the shareholders for the purpose of removing five (5) of the seven (7) current members of the Board and electing five (5) new Board of the Board if such removal was successful. Article II, Section 2 provides:

Special Meetings: Special meeting of shareholders, other than those the calling of which is regulated by statute, may be called at any time by the president or secretary or by a majority of the Board of Directors. **It shall also be the duty of the Secretary to call such meetings whenever requested in writing to do so by shareholders owning at least twenty-five per cent of the outstanding shares of the Corporation.** The secretary shall cause a notice of such special meeting stating the time, place and object thereof and the officer or other person or persons by whom the meeting is called, to be delivered personally or mailed as provided in Section 1 of this Article to such shareholder of record of the Corporation entitled to vote at such meeting not less than ten no more than forty days before such meeting. No business other than that stated in such notice shall be transacted at such special meeting unless the holders of all the outstanding shares of the Corporation be present thereat in person or by proxy (*emphasis added*).

The petition provided to the Board read as follows:

We, the Shareholders of Senate Apartments, want to immediately put a stop to all board activities, remove, and replace the current Board of Directors.

"Pursuant to the Shareholders Signatures that appear below, as per Section 2 of the By-Laws, representing 25% or more of the outstanding Shares, a Special Meeting to Elect New Resident Board Directors (five) shall be called by the President or Secretary of the Board in 10 days, but not more than 40 days, from the Service of this Petition. The sole purposes of this Special Meeting is to recall the existing 5 board of directors. Once they are recalled there will be a vote to elect new board of directors. In lieu of no meeting for this purpose being called by the present Board for the prior of over one year, this meeting should be called as quickly as possible."

Petitioners maintain that the petition for the special meeting was signed by shareholders owning more than twenty-five per cent of the outstanding shares of Senate Apartments Inc.

When the respondents refused to hold a special meeting pursuant to the petition, the petitioners commenced this proceeding requesting the relief referred to above. The respondents maintain, *inter alia*, that the signatures are either invalid or were obtained by fraud.

Before this proceeding was commenced, the Board called for the annual meeting of the Corporation to take place in the first week of May 2019. The election was held as scheduled at which time three (3) new board members were elected.

Respondents maintain the May 2019 election rendered this proceeding moot. The Court agrees (*see Sahid v. 1065 Park Ave. Corp.*, 140 A.D.3d 521, 32 N.Y.S.3d 493; *Matter of Paraskevopoulos v. Stavropoulos*, 65 A.D.3d 1153, 885 N.Y.S.2d 226 [2d Dept.2009]; *Matter of Frascati v. Irondequoit Nightstick Club, Inc.*, 101 A.D.3d 1602, 956 N.Y.S.2d 371 [4th

Dept.2012]).

Petitioners maintains that the May 2019 election did not render this proceeding moot because the special meeting that they claim they are entitled to is for the purpose of having the shareholders vote on whether to remove five (5) of the existing members of the Board and if so removed, for the election of five (5) new Board members. The contend that the May 2019 election resulted in only three (3) new Board members being elected.

While it is true that only three (3) new Board members were elected at the May 2019 annual meeting, the Court can not assume that the signatories to the petition have a continued objection to the composition of the Board as it presently exists which significantly differs from the composition of the Board as it existed at the time the petition was signed. If the signatories still have an objection to the composition of the Board, petitioners have the remedy of submitting a second petition for a special meeting.

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is **DISMISSED**.

Dated: December 30, 2019



PETER P. SWEENEY, J.S.C.

HON. PETER P. SWEENEY, J.S.C.

KINGS COUNTY CLERK
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