Glauber v Wolff
2020 NY Slip Op 31925(U)
June 16, 2020
Supreme Court, New York County
Docket Number: 651949/2019
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL R. EDMEAD** **PART** **IAS MOTION 35EFM**

Justice

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IRA GLAUBER, LEWIS GERSTEN, GILDA ROTHENBERG, JOESPH KLEINPLATZ,

Plaintiff,

- v -

YECHEZEKEL WOLFF, BRUCE KIRSCHNER, GWENN KIRSCHNER, HARVEY LIPKIS, NOAM SPANIER, JAMES ADLER, MATTHEW KISLAK, YEHUDA GURWITZ

Defendant.

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INDEX NO. 651949/2019

MOTION DATE 09/24/2019, 09/24/2019

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 133, 134, 135, 136

were read on this motion to/for MISCELLANEOUS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 127, 128, 129, 130, 131, 132, 137

were read on this motion to/for ALTERNATE SERVICE.

Upon the foregoing documents, it is

ORDERED that the cross-motions to dismiss, pursuant to CPLR Article 3211 (a)(5), (7), (8) and (10), of Respondents Wolff and Kirschners (Motion Sequence 001) is denied; and it is further

ORDERED that Petitioners' motion for alternate service (Motion Sequence 002) is granted to the extent that the time for Petitioners to serve process upon New Respondents shall be extended a further fifteen (15) days from the date of the decision and order on this motion; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Petitioners shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for all parties.

NON-FINAL DISPOSITION

MEMORANDUM DECISION

Petitioners commenced this proceeding pursuant to Section 618 of the New York Not-for-Profit Corporation Law (N-PCL) to set aside the election (Election) of officers and trustees of Respondent Congregation Emunath Israel (Congregation) held on December 4, 2018.

Before this Court are two motions consolidated for disposition. In motion sequence 001, Respondent Yechezekel Wolff (Wolff) and Respondents Bruce and Gwenn Kirschners, Harvey Lipkis, Noam Spanier, James Adler and Matthew Kislak (collectively, Respondent Kirschners) are separately moving for the dismissal of Petitioners' amended Verified Petition pursuant to CPLR 3211 (a)(5), (7), (8) and (10). In motion sequence 002, Petitioners seek an order pursuant to CPLR 308 (5) allowing alternate service of process.

BACKGROUND FACTS

The Congregation is a religious corporation organized and existing under the Religious Corporation Law of the State of New York (NYSCEF doc No. 1, ¶ 2). Petitioners claim to be long-standing officers, trustees and members of the Congregation (*Id.*, ¶ 1). They allege that at the December 4, 2018 membership meeting, Respondents Wolff (the Rabbi), Bruce Kirschner (the President) and Gwenn Kirschner (the Secretary) cast votes for a large number of members through proxies (*Id.*, ¶ 23). Petitioners claim that they were not given notice that proxy votes would be permitted (*Id.*, ¶ 25) and many of the proxies obtained by Respondents were executed by people who are not *bona fide* members of the Congregation (*Id.*, ¶ 23) or were obtained from members under false pretenses (*Id.*, ¶ 26). Petitioners were voted out as officers and board members as a result of the Election.

The Original Petition

On April 3, 2019, Petitioners commenced this proceeding to void the Election on the grounds that it was held in violation of the Congregation's Constitution which prohibits voting by proxy. Petitioners also contend that they were not notified of any change in the policy prohibiting proxies, that the proxies violated Section 207 of the Religious Corporation Law as they were executed in favor of Respondent Wolff who is not a member of the Congregation, and that many long-standing members were not able to participate in the Election because they were wrongfully not considered members in good standing by Respondents. Respondent Wolff cross-moved, pursuant to CPLR 3211(a)(5), (7) and (8) to dismiss the Petition. He argued that he was served with process beyond the fifteen-day period provided under CPLR 306-b (NYSCEF doc No. 10, ¶¶ 15-19; NYCSEF doc No. 19, pp. 2-4) and that Petitioners failed to name or notice the Congregation and all the persons "declared elected" at the disputed Election in violation of N-PCL § 618 (NYSCEF doc No. 10, ¶ 20; NYCSEF doc No.19, pp.4-6). Respondent Kirschners separately filed a motion to dismiss the Petition pursuant to CPLR § 3211(a)(5), (7), (8) and (10). They argued that the Petition should be dismissed for being time-barred (NSYCEF doc No. 61, pp.9-10), for its failure to name necessary parties (*Id.*, pp. 10-13) and for its failure to meet the high burden to set aside an election under N-PCL § 618 (*Id.*, pp. 18-24).

July 2, 2019 Oral Argument[1]

At the July 2, 2019 oral argument, the Court heard and denied Respondents' cross-motions to dismiss. Taking into consideration not just the Petition, but also the affidavits/affirmations submitted by Petitioners, the Court found a cause of action for misuse of proxies that can survive a motion to dismiss under CPLR 3211 (a) (7) (NYSCEF doc No. 79, pp.28-29; 53-54). The Court

[1] After hearing the cross-motions in this case, the Court proceeded to hear pending motions in a related case, Index No. 655475/2018, which is a derivative action (Derivative Action) filed by Petitioners in 2018 since the counsels in both the Derivative Action and this Election Action are the same. The Derivative Action pertains to separate issues and was disposed in November 2019.

likewise denied the cross-motions to dismiss pursuant to CPLR 3211 (a) (5) [running of statute of limitations], (8) [no jurisdiction over the person of the defendant] and (10) [failure to name necessary parties]. While Respondents' arguments in support of these three grounds for dismissal were conflated, they essentially fall into two categories: (i) those which relate to Respondents as originally named parties in this action; and (ii) those which relate to persons who allegedly should have been named as parties. As to the first category, Respondents argued that they were not served with process within the fifteen-day period under CPLR 306-b and can no longer be served with process as the statute of limitations has expired. Thus, Respondents maintained that the Court did not acquire jurisdiction over their persons. The Court rejected these arguments, finding that the action was timely commenced on April 3, 2019 before the expiration of the statute of limitation on April 4, 2019 (NYSCEF doc No. 79, 57:13-15). Further, since Petitioners actually reached out to Respondents' counsels to facilitate service of process before the fifteen-day period lapsed, the Court granted Petitioners' oral motion to deem service of process to Respondents as complete *nunc pro tunc* (*Id.*, 49:5-10).

For the second category of arguments, Respondents contend that this action cannot proceed in view of Petitioners' failure to name the Congregation and ten other individuals elected at the disputed Election as parties. Respondents stated that these unnamed parties can no longer be joined as the statute of limitations already lapsed. Unconvinced, the Court deemed the Congregation and the ten individuals named *nunc pro tunc* to fit in the statute of limitations and allowed the amendment of the Petition to expressly name these persons as parties (*Id.*, 75:21-24). To support these rulings, the Court reasoned that N-PCL § 618 does not say that failure to expressly name the Congregation is fatal (*Id.*, 63:12-13) and the related case law dismissing similar petitions was based on lack of notice which is not true here as the Congregation was notified through its officers

and trustees (*Id.*, 64-65). As to the ten individuals, the Court ruled that naming them as parties by amendment is proper as there remains an issue regarding whether the election results were properly announced to the Congregation members to enable the Petitioners to name all of the elected trustees (*Id.*, 74:20 to 75:20). The Court held that once this issue is resolved, Petitioner can again "move to dismiss *ab initio* with respect to the parties who were not properly named and for whom the statute would have been expired" (*Id.*, 75:18-20).

The Amended Petition

Following the Court's directive, Petitioners filed an amended verified Petition on July 30, 2019 naming the Congregation and ten other elected individuals as respondents (collectively, the New Respondents).

Respondents Wolff and Kirschners are now seeking to dismiss the amended Verified Petition on the ground that it still suffers from fatal defects (motion sequence number 001; *see* NYSCEF doc Nos. 117 and 125). In their opposition, Petitioners maintain that the grounds for dismissal advanced by Respondents have already been raised and denied by this Court at the July 2, 2019 conference (NYSCEF doc No.133, ¶ 3). To the extent that the ground for dismissal relate to service of process on the New Respondents, Petitioners draw the attention of the Court to their motion seeking issuance of an order to allow service of process to them in an alternative manner (motion sequence number 002; *see* NYSCEF doc No. 128).

DISCUSSION

Challenges to elections commenced pursuant to N-PCL § 618 are subject to the four-month statute of limitations under CPLR 217 (*see De Vita v Reab (In re Uranian Phalanster 1st NY Gnostic Lyceum Temple)*, 155 AD2d 302 [1st Dept 1989]). For actions or proceedings where the applicable statute of limitations is four months or less, CPLR 306-b provides that service shall be

made not later than fifteen (15) days after the date on which the applicable statute of limitations expires. If service is not made within this time period, CPLR 306-b further provides that the court, upon motion, shall dismiss the action without prejudice as to that defendant, *or upon good cause shown or in the interest of* justice, extend the time for service." (*Henneberry v Borstein*, 91 AD3d 493 [1st Dept 2012]) (emphasis added). "A 'good cause' extension requires a showing of reasonable diligence in attempting to effect service upon a defendant" (*Henneberry*, 91 AD3d at 496). By contrast, the "interest of justice" is a broader and more forgiving standard that requires a balance of the competing interests and may consider any relevant factors including "diligence, or lack thereof, . . . expiration of the [s]tatute of [l]imitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant[s]" (*Leader v Maroney*, 97 NY2d 95 [2001]).

Motion Sequence 001

Both Respondents Wolff and Kirschners argue that Petitioners' failure to join and notice the New Respondents is a ground for dismissal of the amended verified Petition.

To address this, this Court must differentiate between the issue of failure to *name* the New Respondents as parties and the issue of failure to *serve* them with process. The first issue had already been raised and addressed at the July 2, 2019 oral argument. The Court ruled, and reiterates here, that the New Respondents are deemed *named nunc pro tunc*. *Nunc pro tunc* signifies "now for then" such that the naming of the New Respondents as parties in the amended verified Petition shall have the same legal force and effect as if they were named when the original Petition was filed on April 3, 2019. Consequently, the action against the New Respondents is considered to have been timely commenced before the statute of limitations expired on April 4, 2019. While the Court held that Respondents can again move to dismiss "with respect to the parties who were not

properly named and for whom the statute would have expired," the Court also stated that they should only do so when the issue of whether the election results were properly announced to the Congregation members has been resolved (NYSCEF doc No. 79, 74:20 to 75:20). This issue remains unresolved. Thus, the Court denies the cross-motion to dismiss based on Petitioners' supposed failure to *name* necessary parties before the lapse of the statute of limitations.

Turning now to the issue of failure to *serve* the New Respondents, the Court finds that dismissal on this ground is not warranted and that Petitioners should be given an extension of time to serve in the interest of justice.[2] To support an extension "in the interest of justice", as discussed above, this Court may consider any relevant factors. Here, most substantive factors weigh in favor of Petitioners. *First*, this action was timely commenced by proper filing but would be extinguished if extension is not given as the statute of limitations had already expired (*see Woods v MBD Community Hous. Corp*., 90 AD3d 430 [1st Dept 2011]). *Second*, construing the amended Petition in the light most favorable to Petitioners, as is required on consideration of a CPLR 3211 motion to dismiss, and consistent with the ruling of this Court at the July 2, 2019 oral argument, Petitioners have stated a cause of action for misuse of proxies. *Third*, there is no showing that Respondents (old and new) will be prejudiced with the extension, especially in light of the fact that the period for service of the amended verified Petition was not set at the July 2, 2019 conference, that Petitioners tried to serve the New Respondents by reaching out to Mr. Schulman, counsel for Respondent Kirschners, and that Petitioners filed their motion for alternative method of service on September 13, 2019 – just over a month from the filing of the amended verified Petition on July

[2] The Court exercises its discretion to extend the time to serve *sua sponte* (*see Abdelqader v Abdelqader*, 120 AD3d 1277 [2d Dept 2014]["Accordingly, rather than granting that branch of the motion which was to dismiss the complaint insofar as asserted against Jawad for lack of personal jurisdiction over him, we exercise our discretion and permit the plaintiff, if he be so advised, to serve or re-serve process upon Jawad within 120 days of the date of this decision and order"]).

30, 2019. The Court therefore finds it proper to give Petitioners fifteen (15) days from the date of this decision and order to serve the New Respondents with process[3].

To the extent that the cross-motions to dismiss are based on expiration of the statute of limitations by reason of untimely service of process on *originally-named respondents* (NYSCEF doc No. 125, p. 15), the Court reiterates its July 2, 2019 ruling that service to them is deemed complete *nunc pro tunc* (NYSCEF doc No. 79, 49:5-10).

Motion Sequence 002

Petitioners seek an order pursuant to CPLR 308(5) permitting process to be served on New Respondents in an alternative manner. Specifically, Petitioners request that this Court direct Mr. Schulman, counsel for Respondent Kirschners, to accept service of process on the ground that Mr. Schulman "already represents the old [respondents] and it is undisputed that he also will be representing the new ones in this proceeding" (NYSCEF doc No. 128, ¶ 7). Petitioners contend that other forms of service are "impracticable" as service on them through a process server is "unnecessary and expensive" considering that they are simply "nominal" parties (*Id.*, ¶ 14). In the alternative, Petitioners move that this Court "fashion some other method of service of process, or which requires the Congregation or the respondents themselves to pay for the service of process fees" (*Id.*). Respondent Kirschners are opposing the motion as Mr. Schulman had not been retained by the New Respondents as their attorney (NYSCEF doc No. 137, ¶¶ 2-4).

CPLR 308(5) provides that if it is "impracticable" to serve the initiating pleadings under the provisions of CPLR 308(1) (personal delivery), CPLR 308(2) (leave and mail) and CPLR 308(4) (nail and mail), the court, upon motion without notice, may fashion its own method of

[3] The Court notes that there is an issue as to whether the Congregation has already been served with process on September 9, 2019 as Petitioner claims (NYSCEF doc No. 128, ¶ 6). As Petitioners submitted an unsigned affidavit of service, they are given the same period of time to submit the signed copy to this Court.

service. The impracticability standard "is not capable of easy definition" (*Astrologo v Serra*, 240 AD2d 606 [2d Dept 1997] *citing Markoff v South Nassau Community Hosp*., 91 AD2d 1064, *affd* 611 NY2d 283 [1984]); the meaning of 'impracticable' will depend upon the facts and circumstances of the particular case (*Safadjou v Mohammadi*, 105 AD3d 1423 [4th Dept 2013] *citing Markoff v South Nassau Community Hosp*., 91 AD2d 1064, at 1065).

Here, the Court finds that Petitioners are not entitled to an alternative method of service under CPLR 308 (5). *First*, a survey of recent cases where the Court found that traditional forms of service were "impracticable" involve factual circumstances very different from this case. Those cases involve either plaintiffs who made efforts to serve defendant to no avail (*Fontanez v PV Holding Corp*, 119 NYS3d 864 [1st Dept 2020]; *Wimbledon Fin. Master Fund, Ltd. V Laslop*, 169 AD3d 550 [1st Dept 2019]) or out-of-country defendants with no forwarding address or with an unclear residence (*Kozel v Kozel*, 161 AD3d 700 [1st Dept 2018]; *Solomon v Horie Karate Dojo*, 283 A.D.2d 479 [2d Dept 2001]). In one case where the court granted relief under CPLR 308 (5) by reason of expense, the costs of service was so prohibitive (almost 1/3 of plaintiff's annual salary) that it would effectively have precluded plaintiff from access to courts (*see Porres v Porres*, 104 Misc. 2d 376 [N.Y. Sup. Ct. 1980] ["This court is of the opinion that costs or economics can make service under subdivisions 1, 2 or 4 of CPLR 308 impracticable within the meaning of the statute, and that such is the case in the peculiar facts presented to this court…[as] what is involved here is a denial to the plaintiff of access to the courts because of the prohibitive costs in service of process by any method other than that proposed by plaintiff."].

Second, following First Department precedent, alternative method of service under CPLR 308 (5) should be one that comports with due process such that it is reasonably calculated to apprise defendant of the pendency of an action (*see Wimbledon Fin. Master Fund, Ltd. V Laslop*, 169

AD3d 550 [1st Dept 2019] [service by the Court's e-filing system was allowed upon showing that defendant's counsel "received notices of filings in [that] action through NYSCEF"]; *Alfred E. Mann Living Trust v ETIRC Aviation S.A.R.L.*, 78 AD3d 137 [1st Dept 2010] [Alternative service by email allowed as "[t]he funding agreement specifically provides [defendant's] e-mail address as the means to provide him with any notice, request, demand, or communication. Consequently, service of process at that address is, by definition, "reasonably calculated" to apprise [defendant] of the action and thus comports with the requirements of due process"]). Here, Petitioners failed to show that service upon Mr. Schulman is reasonably calculated to apprise the New Respondents of the pendency of this action and afford them an opportunity to respond, especially in view of Mr. Schulman's assertion that he had not been retained as counsel by New Respondents.

Third, Petitioners cannot rely on the case of *Franklin v Winard* (189 AD2d 717 [1st Dept 1993]). In that case, the Appellate Division upheld the order directing service upon defendant-appellant's attorneys as "plaintiff has demonstrated that her efforts to obtain information regarding the appellant's current residence or place of abode through ordinary means, such as a motor vehicle registration search, had proven ineffectual". In this case, however, the record reflects that Petitioners were furnished by Respondents with a list of the Congregation's current trustees with their addresses (*see* NYSCEF doc No. 103). In another case, the Appellate Division denied relief under CPLR 308 (5) since plaintiff knew the address of the defendant-appellant (*see Franchido v Onay*, 150 AD2d 518 [2d Dept 1989] ["In view of the plaintiff's knowledge of the correct address of the appellant and absent a detailed showing that service was "impracticable" under CPLR 308 (1), (2) and (4), the plaintiff did not sustain his burden of proving entitlement to expedient service pursuant to CPLR 308 (5)"]). *Finally*, Petitioners, through Mr. Glauber, already warranted at the July 2, 2019 oral argument that service will be made on the New Respondents' addresses

(NYSCEF doc No. 79, p. 76 ["Mr. Glauber: "That's fine. We have the right to know the addresses of who the people who are elected, so I would simply request that Mr. Schulman and his co-counsel give us the addresses of those people so we could serve them."]. Thus, Petitioners are not entitled to an alternative method of service under CPLR 308 (5).

Based on the foregoing findings, the Court directs Petitioners to serve the New Respondents with process under either CPLR 308(1) (personal delivery), CPLR 308(2) (leave and mail) or CPLR 308(4) (nail and mail), as may be appropriate, within fifteen (15) days of this order.

CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that the cross-motions to dismiss, pursuant to CPLR Article 3211 (a)(5), (7), (8) and (10), of Respondents Wolff and Kirschners (Motion Sequence 001) is denied; and it is further

ORDERED that Petitioners' motion for alternate service (Motion Sequence 002) is granted to the extent that the time for Petitioners to serve process upon New Respondents shall be extended a further fifteen (15) days from the date of the decision and order on this motion; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Petitioners shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for all parties.

6/16/2020
DATE

J.S.C.
HON. CAROL R. EDMEAD
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE