Matter of Abrams v Ruskin
2020 NY Slip Op 32620(U)
August 10, 2020
Supreme Court, New York County
Docket Number: 156413/2019
Judge: Melissa A. Crane

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 15

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In the Matter of the Application of ADAM C. ABRAMS,

Plaintiff,

-against-

Index No. 156413/2019

THOMAS RUSKIN, individually and as President of the SEAVIEW ASSOCIATION OF FIRE ISLAND NEW YORK INC.,

Defendant.

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Melissa A. Crane, J.S.C.:

In this action for a preliminary injunction (NYSCEF Doc. No. 13), plaintiff Adam C. Abrams seeks an order enjoining Seaview Association of Fire Island New York Inc. ("Seaview") from holding a vote to amend Seaview's bylaws, and for defendant Thomas Ruskin's ("Ruskin") removal as Seaview's president.[1] Defendants cross-move for an order, pursuant to CPLR 3211 (a) (1), (3), (5)[2] and (7), to dismiss the amended complaint.[3]

Background

After filing this action, plaintiff filed an amended complaint, as of right, on July 1, 2019. In the amended complaint, plaintiff alleges that he is the owner of real property at 24 Gale Ave, in Seaview, New York and a member of Seaview. Plaintiff further alleges that Ruskin's position

[1] Together, Ruskin and Seaview may be referred to as "defendants." No answer has been served.
[2] While defendants' notice of motion does not cite to CPLR 3211 (a) (5), it is clear from their moving papers that they are moving based upon the statute of limitations.
[3] On August 19, 2019, at oral argument, plaintiff represented that he had not timely filed opposition to the motion to dismiss. However, defendants represented that plaintiff had emailed opposition to them, which they submitted and addressed. Plaintiff was granted leave to file opposition, and the court is accepting as plaintiff's opposition NYSCEF Doc. Nos. 47, 49 and 55, stating that they are in opposition to the motion to dismiss, as well as the accompanying exhibits. NYSCEF Doc. No.55 was filed on October 16, 2019. At the end of October, plaintiff filed additional papers, including what he labels as an "Affidavit in Response to Defendant's Reply Affirmation" (NYSCEF Doc. No. 63). Defendants objected to these submissions. The court will not consider these submissions as they constitute an unauthorized surreply (*Garced v Clinton Arms Assoc.*, 58 AD3d 506, 509 [1st Dept 2009]).

as Seaview's president violates Article 7-A of the Executive Law, due to Ruskin's 1999 felony conviction. Plaintiff also contends that, on February 5, 2019, defendants wrongfully and unlawfully held a vote to amend Seaview's bylaws ("original bylaws"), to include provisions extending the length of the president's term and to indemnify Ruskin.[4] Plaintiff claims that Seaview improperly conducted the February vote because a seconded motion to postpone the vote to amend the bylaws remained pending and unresolved at the meeting. In addition to a preliminary injunction enjoining Seaview from conducting the June 30, 2019 meeting, and an order removing Ruskin as president of Seaview, the amended complaint seeks a determination as to the validity of the February 5, 2019 vote (NYSCEF Doc. No. 17 at 3).

It is undisputed that Seaview is a New York not-for-profit corporation, operating as a homeowners association. The original bylaws provide that:

> "The Constitution and By-laws may be amended only in the following manner: A proposal of such amendment must receive a two-thirds affirmative vote of the regular members present, in good standing, at th[e] meeting at which such proposal is made. This proposal shall be voted on at the next succeeding meeting of the Association and at such meeting the proposed amendment must receive the affirmative vote of at least two-thirds of the regular members present, in good standing before it is adopted"

(NYSCEF doc. No. 6, ¶ 12). As to "Meetings," the original bylaws provide that "Roberts Rules of Order is adopted by the Association as the authority for the conduct of business at all meetings" (*id*. ¶ 7).

The court declined to grant plaintiff's application for temporary relief. Thus, on June 30, 2019 Seaview conducted the vote to amend.

[4] The amended bylaws extend the term of the Seaview's officers and provide indemnity to them and Seaview's board of directors (*see* NYSCEF Doc. No.7 [Article X, Article XIII]).

In opposition to plaintiff's motion, and in support of defendants' cross-motion, Ruskin avers that, at the February 5, 2019 meeting, in plaintiff's absence and with Ruskin as Chair, the board declined to postpone the vote to amend Seaview's original bylaws (NYSCEF Doc. No. 16, ¶ 7). Specifically, at the February 5, 2019 meeting, 132 persons voted in favor of amending the bylaws. 27 persons voted against amending the bylaws. Further, at the June 30, 2019 meeting, 165 voted in favor of amending the bylaws, and 57 voted against the amendment (*id*., ¶ 5). Ruskin also avers that Seaview operates under the original bylaws of 1954, with the exception of an amendment to permit proxy voting. Plaintiff does not dispute that Seaview's bylaws permit proxy voting.

Discussion

The February 5, 2019 Vote

Defendant moves to dismiss the amended complaint as time-barred, barred by laches, and moot. Addressing the threshold issue of the statute of limitations as to the February 5, 2019 vote,

> "defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff. Further, plaintiff's submissions in response to the motion must be given their most favorable intendment"

(*Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011] [internal quotation marks and citation omitted]).

A proceeding under CPLR Article 78 challenges a body or officer administrative actions (CPLR 7804; *see Bango v Gouverneur Volunteer Rescue Squad, Inc.*, 101 AD3d 1556, 1557 [3d Dept 2012] ["CPLR article 78 . . . is not strictly limited to government actors; it also applies to any 'corporation' (CPLR 7802 [a]). In an Article 78 proceeding, the court can compel public and private corporations to fulfill obligations that the State, municipal statutes, and their own

internal rules impose upon them [internal quotation marks and citation omitted]); *Matter of Caso v New York State Pub. High School Athletic Assn.*, 78 AD2d 41, 45 [4th Dept 1980] ["article 78 proceeding is the appropriate remedy to compel private corporations to fulfill obligations imposed upon them by statute as well as by their internal rules, including adherence to their own hearing or review procedures" [citations omitted]). Plaintiff's only discernable opposition argument concerning the statute of limitations is that his claim sounds in breach of contract. That argument is not persuasive (*id.*; *see also Ullum v American Kennel Club*, 134 AD3d 416, 417 [1st Dept 2015] ["a breach of contract cause of action is not the proper vehicle for a claim that such an association has failed to fulfill obligations imposed by its internal rules"]; *compare Weber v Sidney,* 19 AD2d 494, 497 [1st Dept 1963], *affd* 14 NY2d 929 [1964] [in an action that an individual shareholder brings against another, including for breach of an agreement to share corporation's profits and for officer's salary, the Court opined that "by-law provisions, fixing the basis for the payment of salaries and dividends, are to be given the force and effect of a contract as between the stockholders"]). To the extent that the Amended Complaint seeks a determination "regarding the validity of the disputed vote" held on February 5, 2019, based on the alleged failure to follow Robert's Rules of Order at that meeting (NYSCEF Doc. No. 17), that determination is subject to the four-month statute of limitations of Article 78 and time-barred.

In any event, a preliminary injunction, is an "extraordinary provisional remedy requiring a special showing" and "will only be granted when the party seeking such relief demonstrates a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of equities tipping in favor of the moving party" (*1234 Broadway LLC v West Side SRO Law Project, Goddard Riverside Community Ctr.*, 86 AD3d 18, 23 [1st Dept

2011]). Plaintiff did not "establish a clear right to that relief under the law and the undisputed facts upon the moving papers" (*id*. [internal quotation marks and citation omitted]). Plaintiff did not provide any legal support to demonstrate that, under the circumstances, the court should have enjoined the vote to amend. Plaintiff also does not demonstrate that the motion to adjourn likely would have prevailed (*see Matter of Goldfield Corp. v General Host Corp.*, 29 NY2d 264, 271 [1971] [concerning corporate elections and stating, "[e]ven assuming there were misstatements or concealments, the election may not be set aside unless the court concludes further that the result would have been different had no such improprieties been injected into the proxy campaign, or that an inequitable result has been thereby produced"]). Seaview's bylaws and the law should not have inconsistencies (*Christal v Petry*, 275 App Div 550, 559 [1st Dept 1949], *affd* 301 NY 562 [1950]). Plaintiff fails to demonstrate that, where Seaview permitted and collected proxies, a vote to adjourn a scheduled vote would not serve, improperly, to deprive other members of their vote (*see Azzi v Ryan*, 120 Misc 2d 121, 124 [Sup Ct, Queens County [1983] [noting that N-PCL § 609 entitles members to vote by proxy, unless prohibited in the bylaws, and that "Robert's Rules of Order are merely advisory and cannot be used to deprive members of such an essential and fundamental right"]). In any event, the request for injunctive relief concerning the second vote, in June 2019, is moot because Seaview conducted the vote.

Removal of Ruskin as President

Defendants argue that plaintiff does not have standing to bring an action to remove Ruskin. CPLR 3211 (a) (3) provides for dismissal based upon lack of standing to sue (*Brunner v Estate of Lax*, 137 AD3d 553, 553 [1st Dept 2016]). Defendants carry the burden to establish plaintiff's lack of standing (*id*.; *U.S. Bank N.A. v Guy*, 125 AD3d 845, 847 [2nd Dept 2015]). Defendants argue that Not-For-Profit Corporation Law (N-PCL) § 618 does not authorize

removal of Ruskin as president of Seaview for any of plaintiff's articulated grounds. Defendants further argue that only a vote of the members, the board of directors, or the New York State Attorney General ("AG") can remove Ruskin.

N-PCL § 706 (d) and N-PCL § 714 (c) applies to standing in a proceeding to remove a director or officer of a not-for-profit corporation. Both statutes provide that ten percent of the members of the corporation, or the AG, must bring a removal proceeding. N-PCL § 714 (c) also permits a director to bring the removal proceeding. Plaintiff brings this action alone, as a member, and, therefore, fails to met the statutory requirements for standing. Accordingly, the court must dismiss plaintiff's claim for Ruskin's removal on that ground alone.[5] The court need not address the issue of whether Seaview is a charitable organization, or whether Ruskin is prohibited from holding office.[6]

Additional Opposition Allegations

Plaintiff, in his papers, asserts numerous additional allegations, outside of the scope of the amended complaint, including: (1) Ruskin's announcement at the June 30, 2019 meeting about an office rental transaction, that plaintiff asserts may involve a conflict of interest; (2) the firing of a Seaview employee for reporting alleged misconduct; (3) the number of Seaview's board members; (4) the board's ultra vires acts; (5) the unequal treatment of members; (6) Seaview's need for the appointment of a receiver; (7) improper revenue generating activities that Seaview engages; (8) false accusations made against plaintiff; (9) Ruskin's comments to a group of people that he has "video of [plaintiff] walking naked within [his] own home" (NYSCEF Doc.

[5] The court has reviewed the member affidavits that plaintiff has submitted (NYSCEF Doc. Nos. 24-27), but none reveal that the affiants are directors.

[6] Plaintiff relies on Article 7-A of the Executive Law as his basis for having Ruskin removed. While that statute applies to charitable corporations, plaintiff does not plead that Seaview, a homeowners association, is a charitable corporation, or counter defendants' argument that an application for removal under Article 7-A can be brought other than by the AG under Executive Law 175 (3). Plaintiff submits affidavits to support only that Seaview Association is a 501 (c) (4) corporation, not a 501 (c) (3), charitable, corporation.

No. 47, ¶ 13); (10) issues that plaintiff's contractor, Bruce Danziger, has experienced in his dealings with Ruskin; (11) Seaview's failure to have, or to have circulated to its board, conflict of interest, related-party transactions, or whistleblower policies; (12) Seaview's discontinuance of public access via certain stairs or staircases; and (13) Seaview's removal of stairs on bulkheads in violation of a town code. However, the court previously denied plaintiff's motion to amend the amended complaint because plaintiff did not meet his burden on that motion.

In addition, plaintiff insufficiently alleges additional wrongful conduct. Most of the allegations are, at best, undeveloped. For example, while plaintiff states that the language of the original bylaws does not permit the board to deny membership use of the certain Seaview facilities (NYSCEF Doc. No. 22, ¶ 29), plaintiff does not claim that Seaview has denied him use of the facilities. As to Ruskin's dealings with contractor Bruce Danziger, plaintiff asserts that a claim for tortious interference with contact may lie. However, plaintiff does not allege a contract with Danziger (*see* NYSCEF Doc. No. 47, ¶ 11), and therefore, insufficiently states his claim for tortious interference with contract (*Vigoda v DCA Prods. Plus Inc.*, 293 AD2d 265, 266 [1st Dept 2002].[7] Many of plaintiff's allegations, including that members have come forward with assertions of Ruskin's wrongdoing, are conclusory (NYSCEF Doc. No. 49, ¶ 18; *see also* NYSCEF Doc. No. 47, ¶¶ 6, 18). Plaintiff also does not sufficiently link his additional averments to the membership vote on the amendment of the bylaws, Seaview's conduct of its meetings, or the relief that plaintiff seeks in the amended complaint.

Although plaintiff's claim that Ruskin improperly hired himself as an employee of Seaview, may, potentially, describe injury to the corporation, those claims are derivative (*see Abrams v Donati*, 66 NY2d 951, 953 [1985] ["allegations of mismanagement or diversion of

[7] Plaintiff's submissions about Ruskin's alleged statements made to Bruce Danziger, are alleged to have occurred after the vote (NYCEF Doc. No. 49, ¶ 11).

assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only"]). While plaintiff asserts that some Seaview members are hesitant to come forward due to fear of retaliation, plaintiff does not demonstrate compliance with the requirements of N-PCL § 623 [requiring that five percent or more of the members of the corporation bring the derivative action]). Consequently, it is unnecessary to address plaintiff's 2015 demand on the board.

Plaintiff also argues that defendants have engaged in "a persistent pattern of deliberate violations of the Open Meetings Law" (NYSCEF Doc. No. 22, ¶12, quoting *Matter of Goetschius v Board of Educ. of Greenburgh Eleven Union Free School Dist.*, 244 AD2d 552, 554 [1997]). Specifically, plaintiff alleges that Ruskin announced that members could not record the June membership meeting. The Open Meetings Law (Public Officers Law art 7; hereinafter, the OML) imposes certain requirements upon public bodies, where an entity or group is "performing a governmental function *for the state or for an agency or department thereof, or for a public corporation* as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body" (Public Officers Law § 102 [emphasis added]; *see* Public Officers Law § 100 [OML is intended to ensure that public business is performed in an open manner, and that New Yorkers are not denied the opportunity to "observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy"]). However, plaintiff does not sufficiently plead facts to demonstrate that the OML governs Seaview (*id.*; General Construction Law § 66; *compare Matter of Reese v Daines*, 62 AD3d 1254, 1255 [4th Dept 2009] [entities overseeing merger and consolidation of services of a medical public benefit corporation, with a privately owned entity, that had "final decision-making authority to carry out that function, including

control of the public funding received by" county medical center was subject to public officers law]; *Matter of Syracuse United Neighbors v City of Syracuse*, 80 AD2d 984, 985 [4th Dept 1981] [committees that included governmental representatives and that had their recommendations concerning housing matters "adopted and carried out without exception" by municipality, were governed by Open Meetings Law]; *Matter of MFY Legal Servs., Inc. v Toia*, 93 Misc 2d 147, 148 [Sup Ct, NY County 1977] [advisory committee created under Social Services Law, with Governor appointed members, "to advise the State Commissioner of Social Services," was subject to Public Officers Law as "the giving of advice by the committee either on their own volition or at the request of the commissioner is a necessary governmental function for the proper actions of the [government] Social Services Department"]). Plaintiff also does not allege a persistent pattern of deliberate violations of the OML.

In his papers, plaintiff also seeks to set aside the second vote to amend Seaview's bylaws held at the June 30, 2019 meeting, averring that Seaview again failed to follow Robert's Rules of Order, in the same manner as at the February 6, 2019 meeting (*see* NYSCEF Doc. No. 22). Concerning this newly raised claim, plaintiff does not provide a copy of the text, or recite the text of Robert's Rules of Order, that apply to prohibit the vote on amendments from going forward. Plaintiff also contends that proxies were not polled or "validated," but fails to provide support to demonstrate that Seaview requires polling or validation (*see* NYSCEF Doc. No. 49, ¶ 8), or that the outcome of the vote would have been different. "Court[s] will not consider the validity of a proxy if the outcome of the election would not be altered by the court's determination" (5 Fletcher Cyc. Corp. § 2063; *see also Matter of F.I.G.H.T., Inc,* 79 Misc 2d 655, 660 [Sup Ct, Monroe County 1974]). Plaintiff does not allege facts demonstrating fraud or misrepresentations prior to the vote or in the proxies.

Indeed, "a plaintiff may provide, and the court can consider, sworn affidavits to remedy any defects in the complaint and preserve a possibly inartful pleading that may contain a potentially meritorious claim" (*Ray v Ray*, 108 AD3d 449, 452 [1st Dept 2013]). However, here, plaintiff seeks to amend the complaint to add numerous unrelated claims, without adequate demonstration that these allegations preserve his pleading. Consequently, plaintiff's additional contentions, relating to conduct outside of that addressed in the amended complaint, do not preclude dismissal of the amended complaint.

Here, defendants' direct its motion to dismiss to the amended complaint. The amended complaint is limited, factually, to the February 2019 vote and removal of Ruskin as president due to his felony conviction. Therefore, while the court dismisses the amended complaint, the dismissal is without prejudice to plaintiff to seek leave to replead additional claims, outside of the amended complaint, provided that plaintiff seeks leave within 30 days of the date of this decision, and in accordance with CPLR 3025 (b).[8] Plaintiff's assertion of additional instances of alleged wrongdoing is deemed his request for leave to replead (*Kenney v Immelt*, 41 Misc 3d 1225[A], 2013 NY Slip Op 51831[U], *22 [Sup Ct, NY County 2013] ["[t]he failure to request leave to replead in the opposition papers can be excused in the court's discretion" [internal quotation marks and citation omitted]).

Sanctions

Defendants contend that sanctions are warranted pursuant to Rule 130-1.1 (22 NYCRR 130-1.1) because New York County is far from defendant's location, plaintiff changed his

[8] Plaintiff's request that the court consolidate this case with an unspecified case that he has commenced in an unspecified court in Suffolk County, New York (*see* NYSCEF Doc. No. 55, ¶ 14) is denied as the request is inadequately supported. However, as the court is not adjudicating the merits of plaintiff's assertions outside of the amended complaint, plaintiff is not precluded by this order from seeking relief from another court concerning those claims.

theory, employed inconvenient, and even inconsiderate, timing in commencing the action close to the June 30, 2019 meeting, and made mistakes in his papers. Rule 130-1.1 permits a court, in its discretion, to impose sanctions for frivolous conduct. Conduct is defined as frivolous when "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" or "is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR 130-1.1 [c] [1], [2]). Seaview's bylaws provide that Robert's Rules of Order govern conduct at the meeting. Defendants do not demonstrate that Seaview followed those rules. Defendants also admit that a person might view the circumstances surrounding the motion made at the February 2, 2019 meeting as irregular (*see* NYSCEF Doc. No. 15, ¶ 13). Under these circumstances, sanctions are not warranted. Defendants' counsel's belief that the totality of the circumstances constitutes harassment is unavailing.

Counsel for defendants also argue that plaintiff represented that he made changes to the form of the papers that he submitted to the court, but that his papers were otherwise substantially the same. In fact, defendants contend, plaintiff changed his procedural arguments, and failed to provide them with a copy of the changed papers. While the court does not condone that conduct, defendants do not demonstrate that it suffices to demonstrate that plaintiff made a "material factual statement. . . that [is] false" (22 NYCRR 130-1.1 [c] [3]). Accordingly, the court, in its discretion, declines to impose sanctions on this record.

Conclusion

In light of the foregoing, it is

ORDERED that the court denies plaintiff's motion for a preliminary injunction enjoining the June 30, 2019 meeting, and for an order directing the removal of Thomas Ruskin as president of Seaview Association of Fire Island New York Inc. (motion sequence no. 001); and it is further

ORDERED that the court grants defendants' cross motion to dismiss the complaint and for sanctions but only to the extent that the complaint is dismissed without prejudice to plaintiff moving within 30 days of the date of this decision for leave to replead, and only in accordance with the directives in this decision, and the court otherwise denies defendants' motion.

Dated: August 10, 2020

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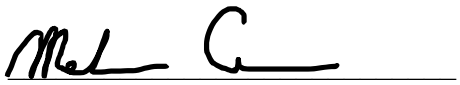

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