

Scarcella v Sea Gate Assn.

2021 NY Slip Op 32227(U)

November 8, 2021

Supreme Court, Kings County

Docket Number: Index No. 113/21

Judge: Karen B. Rothenberg

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At an IAS Term, Part 35, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 8th day of November, 2021.

P R E S E N T:

HON. KAREN B. ROTHENBERG,

Justice.

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VINCENT SCARCELLA, ANASTASIA BLYAKHER,
GARY DANIELS, OLGA SCARCELLA, and LUBA
SEMENOV,

Petitioners,

-against-

Index No. 113/21

THE SEA GATE ASSOCIATION,

Respondent.

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The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	3, 10-11
Opposing Affidavits (Affirmations) _____	11, 23, 29
Affidavits/ Affirmations in Reply _____	32
Other Papers: <u> Affidavit in Support</u> _____	23

Pro se Petitioners Vincent Scarcella, Anastasia Blyakher, Gary Daniels, Olga Scarcella and Luba Semenov commenced this proceeding, by order to show cause (OSC) and petition, seeking the following relief: (a) removal of each member of the Board of Directors of respondent Sea Gate Association; (b) an injunction enjoining each member of the Board of Directors from future service as an officer, director, trustee or fiduciary of any not-for-profit or charitable organization incorporated or authorized to conduct business in New York State; (c) a forensic audit of respondent’s financial data and

documentation for the fiscal and calendar years ending 2017, 2018, 2019 and 2020, with results reported to the court; (d) appointment of a temporary Trustee with legal authority to manage and operate respondent until such time as a new Board of Directors is elected to perform such duties; (e) an injunction enjoining any current or past member of respondent's Board of Directors or any of its representatives or agents from altering, changing, amending, moving, removing and/or destroying any documentation belonging to respondent, whether located in respondent's office or at any other location; (f) formation of an advisory committee comprised of four of the named petitioners to act, on a non-paid basis, in an advisory and consulting capacity for the benefit of the Trustee; (g) an injunction enjoining respondent from entering into any new contractual agreements until such time as the Trustee reviews and approves such potential agreement(s); and (h) an order directing an election, to be supervised by the Trustee, for a new Board of Directors. Respondent cross-moves for an order: (1) pursuant to CPLR 217 and CPLR article 78, dismissing petitioner's petition as time-barred; (2) pursuant to CPLR 3211 (a) (10), 1001, 1003 and Not-For-Profit Corporations Law (N-PCL) § 618, dismissing the petition for failing to join necessary parties; (3) pursuant to CPLR 3211 (a) (7), 3013 and 3014, dismissing the petition for failing to state a cause of action; and (4) to the extent applicable, pursuant to CPLR 3016, dismissing the petition for failure to plead with particularity.

Respondent is a homeowners' association and not-for-profit corporation comprised of members residing in the private Sea Gate community in Brooklyn. Respondent is governed by a Board of Directors which is elected by the members and

serves in accordance with respondent's by-laws. According to the petition, petitioners are members of respondent by their direct ownership of properties within the community of Sea Gate and/or the marital membership rights granted to them in accordance with respondent's by-laws. The essential claims set forth in the petition are that respondent's Board of Directors must be removed and replaced as they were not duly elected in accordance with internal rules and procedures; that certain members were wrongfully disenfranchised, adversely affecting election results; that from 2016 through 2019, respondent filed inaccurate or improper tax returns, containing falsehoods, thereby jeopardizing respondent's status as a not-for-profit, tax-exempt corporation and necessitating a Trustee to oversee and administer respondent until a new Board of Directors is elected; and that respondent is collecting excessive dues and charges from residents to fund the Sea Gate Police Department, which petitioners allege is comprised only of "peace officers" replaceable with a less expensive private security firm. Petitioners bring this proceeding pursuant to N-PCL §§ 202 (General and special powers),¹ 618 (Power of supreme court respecting elections), 719 (Liability of directors in certain cases), 720 (Actions against directors, officers and key persons) and 1113 (Injunction). Respondent cross-moves to dismiss this proceeding on grounds that the claims are untimely, that petitioners failed to serve and join necessary parties (i.e., the individual directors) and that the petition does not comply with pleading requirements and fails to state a cause of action.

¹ As relevant to this proceeding, this section provides that each corporation shall have power, in furtherance of its corporate purposes, "[t]o sue and be sued in all courts and to participate in actions and proceedings, whether judicial, administrative, arbitative or otherwise, in like cases as natural persons (N-PCL § 202 [a] [2]).

Petitioners challenge the validity of the elections of respondents' Board of Directors from 2016 to the most recent election on October 12, 2020. In particular, petitioners argue that an independent slate of candidates (comprised of four of the petitioners herein) seeking office at the October 12, 2020 election was wrongfully rejected for lacking the requisite number of member signatures and that a further vote on October 12, 2020 regarding the approval of an easement was tainted by the improper disqualification of 130 proxy ballots.

N-PCL § 618 provides:

“Upon the petition of any member aggrieved by an election and upon notice to the persons declared elected thereat, the corporation and such other persons as the court may direct, the supreme court at a special term held within the judicial district where the office of the corporation is located shall forthwith hear the proofs and allegations of the parties, and confirm the election, order a new election, or take such other action as justice may require.”

Insofar as petitioners challenge the results of the election held on October 12, 2020, they were required to commence this proceeding within four months of the election (CPLR 217; CPLR 7802 (a); *see De Vita v Reab*, 155 AD2d 302, 302-303 [1st Dept 1989]) and, furthermore, serve each of the “the persons declared elected” at the contested elections (*De Vita*, 155 AD2d at 303). Taking into consideration the COVID-19 toll, which expired on November 3, 2020 (Executive Order [A. Cuomo] No. 202.72 [9 NYCRR 8.202.72]), petitioners' time to commence a proceeding under N-PCL § 618 expired on March 3, 2021. Petitioners did not file a request for judicial intervention for the instant proceeding until March 30, 2021 and did not file the instant OSC and petition

until April 16, 2021. Thus, any challenge to the results of the election held on October 12, 2020, or any election held prior thereto, is untimely. Moreover, there is no proof that each of the persons elected to the Board of Directors on October 12, 2020 were served as required by N-PCL § 618.

Turning to petitioners' claims against respondent under N-PCL § 719 (a), predicated upon any alleged misconduct by or unauthorized or "illegal" actions of the Board of Directors, N-PCL § 720 provides, in pertinent part:

“(b) An action may be brought for the relief provided in this section and in paragraph (a) of section 719 (Liabilities of directors in certain cases) by the attorney general, by the corporation, or, in the right of the corporation, by any of the following:

* * *

(3) Under section 623 (Members' derivative action brought in the right of the corporation to procure a judgment in its favor), by one or more of the members thereof.”

N-PCL § 623 (a) provides, in relevant part, that “[a]n action may be brought in the right of a domestic or foreign corporation to procure a judgment in its favor **by five percent or more of any class of members**” (Emphasis added). The five percent representation requirement of N-PCL § 623 (a) applies to actions brought pursuant to N-PCL § 720 (b) (3) (see *Dachille v Batchelor*, 19 AD3d 1065 [4th Dept 2005]; *Bernbach v Bonnie Briar Country Club*, 144 AD2d 610 [1988], *lv dismissed* 74 NY2d 715 [1989]); *Hoffert v Dank*, 55 AD2d 518 [1st Dept 1976]). There is no allegation in the petition that the five named petitioners represent five percent or more of the total number of

respondent's members which, according to petitioners' own claims regarding the contested easement vote, is at least 130 members.²

While a court considering a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7) must accept the facts as alleged in the pleading as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Meyer v North Shore–Long Is. Jewish Health Sys., Inc.*, 137 AD3d 880, 880-881 [2d Dept 2016]; *Cecal v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]), “allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration” (*Garber v Board of Trustees of State Univ. of NY*, 38 AD3d 833, 834 [2d Dept 2007], quoting *Maas v Cornell Univ.*, 94 NY2d 87, 91 [1999]). Further, CPLR 3013 provides that “[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.” Thus, conclusory allegations will not suffice (*see DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 239 [2d Dept 1984]; *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113, 113 [1st Dept 2003]; *Shariff v Murray*, 33 AD3d 688 [2d Dept 2006]). When the allegations in a complaint are vague or conclusory, dismissal for failure to state a cause of action is warranted (*Schuckman Realty, Inc. v Marine Midland Bank, N.A.*, 244 AD2d

² While not cited by petitioners, an action under N-PCL § 706 (d) to procure a judgment removing a director for cause must be brought by either the attorney general or ten percent of the members of the corporation.

400, 401 [2d Dept 1997]; *O’Riordan v Suffolk Chapter, Local No. 852, Civil Service Employees Association, Inc.*, 95 AD2d 800, 800 [2d Dept1983]).

Here, the petition largely sets forth conclusory and unsubstantiated claims of illegality and/or impropriety on the part of respondent and the allegations regarding specific actions, conduct and/or decisions of respondent, even if deemed true, fail to form the basis of any cognizable causes of action available to, and maintainable by, petitioners in their individual capacities.

Finally, petitioners are not entitled to an injunction under N-PCL § 1113 as the instant proceeding does not seek judicial dissolution of respondent (N-PCL § 1113 [a] [court may grant injunction restraining corporation and its directors “[a]t any stage of an action or special proceeding *under this article* [11]” [emphasis added]).

As a result, the instant petition is denied, the cross motion of respondent is granted and this proceeding is dismissed.

The foregoing constitutes the decision, order and judgment of the court.

ENTER,



J. S. C.