

**Jablecki v Board of Mgrs. of Harborview  
Condominium**

2023 NY Slip Op 31278(U)

April 20, 2023

Supreme Court, New York County

Docket Number: Index No. 152072/2023

Judge: Arthur F. Engoron

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Article III § 1 of the By-Laws, which “may not be amended without the written consent of” the Condominium’s original sponsor, non-party 44-46 Market LLC (“Sponsor”), describes the composition and selection process of the three-person Board. Specifically, the Sponsor selects one Board member, and the Condominium unit owners elect the remaining two. NYSCEF Doc. No. 2. Article III § 1 also states that “[e]ach Unit Owner shall be entitled to cast one vote on each ballot for each Unit he owns. The nominees on each of the ballots receiving the highest number of votes on their ballot shall constitute the duly elected Board of Managers.” Id. It also states that “a majority of” the Board other than the Sponsor’s designees “shall be owner-occupants of the building who are unrelated to Sponsor or its principals.” Id.

There is nothing in the record to imply that Sponsor ever approved any amendment or change to Article III § 1 of the By-Laws.

Pursuant to Article III § 5 of the By-Laws, “every Unit Owner or his representative and mortgagee shall be entitled to examine the books and records of the Condominium on reasonable notice to the Board but not more often than once a month.” NYSCEF Doc. No. 2.

#### Procedural Background

Petitioners allege, inter alia, that the Board has not held required annual meetings, that it has repeatedly seated to the Board individuals who are not owner-occupants of the Condominium, and that it has refused them access to the Condominium’s books. NYSCEF Doc. No. 1.

On March 6, 2023, petitioners filed the instant petition, and, on March 8, 2023, this Court signed an Order to Show Cause (“OSC”) with a Temporary Restraining Order (“TRO”) barring the Board from “entering into any transaction or making any expenditures out of the ordinary course of business.” NYSCEF Doc. Nos. 1 and 16. The OSC set virtual oral argument to be held March 28, 2023, and stated that service upon Board’s then-managing agent, non-party Century 21 New Golden Age Realty (“Century 21”), by overnight mail “shall be deemed good and sufficient service.” Id.

Also on March 8, 2023, pursuant to the OSC, the instant petition was served upon Respondent through Century 21, via overnight mail. NYSCEF Doc. No. 17.

On March 10, 2023, petitioner Mr. Jablecki states that he received by mail a Notice of Meeting dated March 7, 2023, which announced the Board’s annual meeting would be held on March 14, 2023. NYSCEF Doc. Nos. 30 and 25. Soon after, petitioners advised the Board that the March 7 Notice did not comply with the By-Laws and that they would only participate under protest. NYSCEF Doc. No. 30 ¶¶ 6-7. At some point on March 14, 2023, a cancellation notice was placed on the door of the location where the meeting was to be held. Id. at ¶ 8.

On March 21, 2023, respondent filed a cross-motion seeking, inter alia, the dismissal of the petition or, in the alternative, a stay of the instant proceeding while a “referee or other judicial hearing officer” determines if petitioners seek Board’s records for a legitimate and good faith purpose. NYSCEF Doc. No. 18. Respondent argues, inter alia, that there have been Board meetings in the past few years, that the OSC was never served upon the Board or any Board Member, that Mr. Jablecki has already looked at the Board records in the past and is only

seeking them now in bad faith, and that “there is no requirement under the by-laws that the ‘owner-occupant’ who may serve on the Board be a residential unit owner-occupant or a natural person.” NYSCEF Doc. No. 19.

Also on March 21, 2023, Mr. Jablecki swears that he received by mail a notice to all Condominium unit owners that Century 21 would no longer be the building’s managing agent “effective April 1, 2023.” NYSCEF Doc. Nos. 30 and 31.

Subsequently, another Notice of Meeting, dated March 21, 2023, was distributed to Condominium unit owners announcing a Board of Managers election to be held Thursday, March 31, 2023, at 11 am, at which “candidates *receiving the highest number of votes* in each category will be elected to the Board” (“March 31 Election”). NYSCEF Doc. No. 26 (emphasis added).

On March 24, 2023, the parties consented to adjourn oral argument for the OSC to April 13, 2023, to allow for the March 31 Election to occur and potentially moot the instant proceeding.

The parties dispute many of the details of the March 31 Election, but it is nonetheless clear that: a number of purported proxy votes had their veracity called into question and were rejected by the Board; the votes that were counted were tabulated by each unit owner’s *percentage of the common interest* in the Condominium; and that the new Board that was purportedly elected was the same as the previous Board. Specifically, the Sponsor’s member, Howard Chin, was selected and “Jimmy” Ziming Shen and Qinghua “Cherry” Li were purportedly elected.

On the afternoon of April 12, 2023, petitioners filed opposition papers to respondent’s cross motion. NYSCEF Doc. Nos. 30-37. In those papers petitioners argue that Mr. Shen, an owner of the LLC which owns the Condominium’s community facility units, and Ms. Li, an employee of Mr. Shen, are not “owner-occupants” and therefore cannot serve on the Board as a majority of its non-sponsor selected members must be “owner-occupants.” NYSCEF Doc. No. 34.

As to service, petitioners argue that: service upon the Board via its managing agent was proper pursuant to the OSC, because Century 21 was not “fired” until after service was made; that petitioners have been trying to serve Mr. Chin, who may or may not be an officer of the Board, but have been stymied in their attempts; that the other purported Board members have repeatedly evaded service at their home addresses (which are not located in the Condominium); and that, in any event, the Board has made service unnecessarily difficult by failing to designate the New York Secretary of State as an agent for service, in violation of RPL § 339-N(7). NYSCEF Doc. No. 34.

Petitioners also argue that the Board, in “firing” its managing agent, Century 21, and hiring another agent violated this Court’s TRO. NYSCEF Doc. No. 34.

On April 13, 2023, virtual oral argument was held.

On April 14, 2023, respondent filed either a motion or cross motion, the notice is inconsistent, for leave to file a reply to petitioners’ opposition papers. NYSCEF Doc. No. 38. In said reply

papers respondent argues that the March 31 Election was properly held and makes the instant petition moot, that the proxy votes rejected at the that election were done so properly, that the “by share” voting tabulation method used at that Election was long-standing Board practice, and he reiterates the theory that Mr. Shen is an owner-occupant. NYSCEF Doc. No. 39.

### Discussion

#### *Motion to File*

As an initial matter, that portion of respondent’s motion seeking leave to file answering papers is granted and the attached papers are deemed filed, as there appears to be no prejudice to either party in doing so and there was a very short turnaround between petitioner’s opposition papers and oral argument. CPLR 2001.

#### *Service Upon Century 21*

Service here was properly effectuated upon respondent via Century 21, at the time the managing agent for the Condominium, as it complied with this Court’s OSC and was reasonable.

#### *The March 31 Election*

Respondents argue that Mr. Shen, the Board’s purported president, is eligible to serve because he has done so for 15 years and because he owns a 50% share of non-party Goldstein Freshmeadow Realty, LLC (“GFR”), which owns the two community facility units in the Condominium and is therefore an owner occupant. There does not seem to be a question that Mr. Shen is a part-owner of the community facility units in the Condominium. The question is if he is an owner-occupant, as required by the By-Laws.

Mr. Shen’s affidavits, NYSCEF Doc. Nos. 20 and 40, make clear that the community facility units are mostly occupied by another non-party, Metrokids Preschool (“Metrokids”), which Mr. Shen alleges he is a “part owner of.” Mr. Shen alleges that while he “manage[s] the business affairs” of his LLC in those units, he also states that only Ms. Li “occupies the commercial units on a daily basis to operate the business of the LLC.”

Respondents also argue that Ms. Li, the Board’s purported secretary, is eligible to sit on the Board because she is an officer/manager of GFR and works out of the Condominium. NYSCEF Doc. No. 20 ¶ 5.

Neither Mr. Shen nor Ms. Li is eligible to run for or to sit on the Board. Ms. Li is simply not an owner-occupant of the Condominium; she is an employee of GFR. And while Mr. Shen is a partial owner of two units in the Condominium, he offers merely conclusory statements that he occasionally “manage[s] the business affairs” in the units in question, units which GFR allegedly occupies with Metrokids. Further, it is not clear Mr. Shen can even be managing business affairs in the units in question as, pursuant to the By-Laws, the community facility units Mr. Shen partially owns are “limited to community services such as educational, health care, meeting facilities and similar services that are not retail or commercial in nature.”

Respondent and Mr. Shen also argue that votes were correctly tabulated at the March 31 Election because the By-Laws do not “specify the manner the votes are to be computed and when there is a majority” and that it is “long standing practice in computing unit owner votes where each unit

owner vote was counted based on a percentage of ownership in the common interest each unit owner held.” NYSCEF Doc. No. 40. Respondents go on to discuss the various definitions of the word “majority” that can be used in by-laws under RPL § 339-e (8).

Respondents are incorrect, however, as the By-Laws clearly state that “the nominees on each of the ballots receiving the *highest number of votes* on their ballot shall constitute the duly elected Board of Managers.” Further, the Notice of the election sent to the Condominium owners states that “the candidates receiving the *highest number of votes*” will be elected. NYSCEF Doc. No. 26. If the By-Laws and the Notice intended to calculate winners by a majority determined by something other than the number of votes they would say that, but they do not. Both the By-Laws and the Notices say the election will be determined by the “highest number of votes.”

Further, respondent’s arguments that tabulating votes by share is the long-standing practice of the Board is neither here nor there. Article III § 1 of the By-Laws is clear that elections will be determined by the highest number of votes and that the same section cannot be changed without the written consent of the Sponsor. There is nothing on the record to imply the Sponsor ever consented to amend that section or to another manner of tabulation.

Therefore, the Board’s March 31 Election was invalid as it violated the By-Laws by: (1) allowing ineligible candidates to run; and (2) tabulating votes in a manner inconsistent with the By-Laws and with the notices sent to Condominium unit owners.

#### *The Condominium’s Books*

Despite the protestations of respondent, petitioners have shown a valid purpose and a good faith reason to inspect the Condominium’s books in addition to the rights afforded to them to do so by the By-Laws. The fact that petitioner Mr. Jablecki inspected some of the books (and raised questions about them) in the past does not preclude an inspection now. Pomerance v McGrath, 143 AD3d 443, 447 (1st Dept 2016) (condominium owner has a right to examine “records at the managing agent’s office, during convenient weekday hours, includes the right to create paper copies or electronic copies at her own expense during her inspection.”).

#### Conclusion

Therefore, **IT IS HEREBY ORDERED** that respondent must call an annual meeting of Unit Owners to be held on May 10, 2023, at 7:00 P.M. in the lobby of the Condominium building, located at 44-46 Market Street, New York, New York. Respondent shall mail a Notice of Meeting to all Unit Owners and shall post a Notice of Meeting in the lobby of the Condominium on or before April 28, 2023. Counsel for respondents shall also email a copy of the Notice of Meeting to petitioners’ counsel on or before April 28, 2023. Owner-occupants can submit their nominations to run for seats on the Board by writing their names on a Nomination Form to be posted in Lobby of the Building on the date the Notice of Meeting is mailed. Nominations will also be accepted from the floor at the Annual Meeting at any time prior to the election.

**IT IS ALSO HEREBY ORDERED** that petitioner’s Order to Show Cause is also granted to the extent that respondents must make available copies of the Condominium’s books and records set-forth on Exhibit E to the Verified Petition on or before May 1, 2023; and

**IT IS ALSO HEREBY ORDERED** that neither “Jimmy” Ziming Shen, Qinhua “Cherry” Li, nor any other owner or agent of Goldstein Freshmeadow Realty I.L.C shall be eligible to run for a seat on the Board; and

**IT ALSO HEREBY ORDERED** that each Unit Owner will be entitled to cast one vote for each Unit owned by such Unit Owner, and the votes will not be tabulated by Unit Owner’s percentage of ownership interest in the Condominium; and

**IT ALSO HEREBY ORDERED** that pending the holding of the annual meeting and election, respondent is barred from entering into any transaction or making any expenditures out of the ordinary course of business; and

**IT IS ALSO HEREBY ORDERED** that Respondent’s application for leave to file reply papers is granted; and

**IT IS ALSO HEREBY ORDERED** that this Court shall retain jurisdiction over this proceeding pending the completion of a valid election pursuant to the terms and conditions contained herein and that the parties are required to inform the Court whether or not a valid election took place by emailing [argreenf@nycourts.gov](mailto:argreenf@nycourts.gov) by May 12, 2023.



<u>4/20/2023</u>			<u>ARTHUR F. ENGORON, J.S.C.</u>
DATE			
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE