SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH **PART 18**

Justice

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INDEX NO. 153786/2021

MOTION DATE 02/23/2022

MOTION SEQ. NO. 001

In the matter of the application of

ANDREW FARBER, ROBERT BASSAN, and TANIA BASSAN,

Petitioners,

For a Judgment Pursuant to Article 78 and 3001 of the Civil Practice Law and Rules,

-against-

DECISION + ORDER ON PETITION

HARRY SPRING; JOSE CAMPON; GEORGE ANDREOPOULOS, THE BOARD OF MANAGERS OF THE ALLEGRO CONDOMINIUM, and THE ALLEGRO CONDOMINIUM,

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1-13, 15, 16, 17, 18, 19, 20, 24, 44, 51, 53, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

In this Article 78 proceeding, petitioners challenge the results of the December 20-21, 2020, election of three members of respondent The Board of Managers of the Allegro Condominium (the Board). The Allegro Condominium (the Allegro) is located at 62 West 62nd Street in Manhattan. Petitioners and the individual respondents all own apartments in the Allegro. Respondents Spring, Campon, and Andreopouolos (the individual respondents) were Board members before the election in question and allege that they won the election. Petitioners allege that petitioner Farber, and nonparties Steven Bobowicz and Kathleen McCormack are the rightful winners of the election. Petitioners request the immediate installation of the purported rightful winners on the Board (*see* NYSCEF Doc. No. 1 [Petition]). The parties have not held their annual elections since this time, as they are unable to resolve

the current dispute (*see also* NYSCEF Doc. No. 14 in *Farber v Spring*, Index No. 161041/2021, Sup Ct, NY County, Tisch, J., Dec 20, 2021 [in related proceeding challenging a plan to hold annual election in 2021, parties ultimately stipulated that the Board would not hold a further election or meeting without providing the petitioners with at least five business days' notice]).

The Allegro Bylaws

Pursuant to the Allegro's bylaws, the Board consists of three to five members, who are elected by the unit owners at the Allegro's owners' annual meetings (NYSCEF Doc. No. 2 [By-Laws of The Allegro], Art II, § 2, Art III, § 1). The Board, as constituted, consists of five members. According to the petition, there are elections for three of the seats in even-numbered years, and elections for two of the seats in odd-numbered years (NYSCEF Doc. No. 1, ¶¶ 24-25).

The unit owners are entitled to one vote for every .01% of their ownership interest in the common elements of the Allegro (NYSCEF Doc. No. 2, Art III, § 8). A quorum exists when unit owners who possess more than 50% of the authorized votes are in attendance in person or by proxy (*id.*, Art III, § 10). Article III, section 8 sets forth the requirements for proxy voting. The provision states that "[t]he designation of any such proxy shall be in writing to the Secretary, and [it] shall be revocable at any time by written notice to the Secretary by the Owner or Owners so designating" (*id.*, Art III, § 8).

In the absence of a quorum, those present may adjourn the annual meeting by majority vote (*id.*, Art III, § 5). The meeting must be held at least 48 hours after the date and time of the original meeting (*id.*).

Facts and Allegations

Initially, the three individual respondents were up for reelection on November 16, 2020. The meeting was to be held virtually because of the Covid pandemic. The Board issued proxies that stated

> "KNOW ALL PERSONS BY THESE PRESENTS: That I, the undersigned Unit Owner of The ALLEGRO CONDOMINIUM, do hereby constitute and appoint _____ or Board of Managers, attorneys, and agents for me and in my name, place and stead, to vote as

> my proxy at the Annual Meeting of Unit Owners of The Allegro Condominium, to be held virtually on November 16, 2020, at 7:00 p.m., and at any adjournment thereof, according to the number of votes I should be entitled to cast if then personally present, upon the matters as expressed in the notice of said meeting as " (NYSCEF Doc. No. 3).

The final sentence ends without further clarification.

On November 16, 2020, there was a lack of a quorum so the meeting could not take place. Accordingly, the meeting was rescheduled for December 21, 2020. This meeting also was to take place virtually. On November 18, 2020, the Board sent out a new proxy, which stated

> "The undersigned unit owner of The Allegro Condominium (the 'Condominium') hereby appoints _____ (or if no name is inserted then the Board of Managers by majority vote), with full powers of substitution, to represent and to vote as proxy, as designated, his/her/their unit(s) and common interest in the Condominium held of record by the undersigned on November 18, 2020, at the Annual Meeting of Unit Owners (the 'Annual Meeting') to be held on December 21, 2020 at 7:00 p.m., or at any adjournment or postponement thereof, upon the matters described in the Notice of Annual Meeting. The undersigned hereby revokes all prior proxies. The unit(s) and common interest represented by this Proxy will be voted in the manner directed herein by the undersigned unit owner, who will be entitled to one vote for each unit .0 1% of common interest attributable to his or her unit(s). This Proxy, when properly executed, will be voted in the manner directed herein by the undersigned Unit Owner. The undersigned hereby acknowledges receipt of the Notice of Annual Meeting dated November 18, 2020" (NYSCEF Doc. No. 4).[1]

There is no stated limitation on the proxy. Further, there is no indication that the proxy is irrevocable.

Prior to the meeting, five of the unit owners, including petitioners Andrew Farber and Robert Bassan, submitted an open letter to the Board, purportedly "[o]n behalf of a large group of Owners" (NYSCEF Doc. No. 5). The letter noted that several Board members had served for over 15 years, and it expressed the position that Board membership should be limited to 2 consecutive 2-year terms. In addition, it "recommend[ed] that current Board members whose terms are expiring and who have served

[1] The Court cannot locate in either parties' filings the correspondence that Maxwell Kates sent along with the proxy, which respondent Spring mentions in his affidavit in support of the answer (NYSCEF Doc. No. 61, ¶ 8).

in excess of two consecutive 2-year terms, voluntarily withdraw from consideration to allow participation by other fellow Owners" (*id.*). The three Board members, respondents Andreopoulos, Spring, and Campon, did not withdraw from consideration. Three other unit owners, Steven Bobowicz, Kathlen McCormack, and Farber, ran against them.

Petitioners allege that by December 21, 2020, Farber had received 39 signed proxies which enabled him to vote on behalf of the named unit owners. In addition, they state, Farber had transmitted the proxies to Maxwell Kates, the managing agent and secretary. Thus, according to petitioners, the individual respondents possessed the proxies in advance and realized that the current Board members would not regain their seats. The petition asserts that, at the meeting, which was held on Zoom, the Board "employ[ed] numerous measures to manipulate the election, including only enabling Board members and their attorneys to be visible, and only allowing a few Owners to talk during the Meeting" (NYSCEF Doc. No. 1 [Petition], ¶ 37). According to the petition, "many" owners stated that, although they raised their hands, they were not acknowledged or allowed to participate (*id.*).

Further, the petition alleges that the individual respondents deliberately prolonged the meeting – among other things, by disparaging Bobowicz, McCormack, and Farber. After four hours, the individual respondents declared that votes would be accepted until the next day at noon. According to petitioners, this constituted an adjournment of the meeting. At the end of the extended voting period, the individual respondents purportedly won reelection.

On December 22, 2020, Bobowicz, McCormack, and Farber, along with petitioner Robert Bassan and non-party Humad Ahmed, wrote an open letter to the Board protesting the way the members had handled the meeting (NYSCEF Doc. No. 6). Especially pertinent here, the letter objected that there had been no reasonable plan for the election and no clear explanation of the election rules in advance, that the election had been improperly extended, and that, after the meeting, the management company had told owners that they could change their proxies.

A few days later, on December 24, 2020, the Board issued its own letter to the owners of the apartments in the Allegro (NYSCEF Doc. No. 7). The letter stated that the proxies were defective because they did not "identify in the proxy or in a separate writing given with the Ballot the candidates the unit owner directed the proxyholder to vote for" (*id.*). In addition, the letter commented that several unit owners who had given proxies decided to vote directly instead, causing duplicate ballots for those units. The letter further indicated "that when counting only the ballots cast by unit owners, the three incumbents . . . were elected. When counting the ballots cast by unit owners and the proxyholders, Harry Spring, Steven Bobowicz and Kathleen McCormack would have been elected" (*id.*). Because the Board determined that the proxy voters may not have understood that they had to direct the proxyholder which candidates they preferred, the Board called for a new election in January or February, which would have more explicit directions for proxy voting – including that the voter could direct the proxyholder to select the candidates. The letter changed the Board member's tenure, stating that the terms would now expire two years from 2021, and the 2021 elections would instead take place in 2022.

According to the petition, the letter was misleading. It claims that the proxy language was not ambiguous, and the proxies were not defective. It also points out that the letter did not identify the purportedly confused proxy voters. Instead, the inspector of the election "unilaterally declined to count certain of the ballots, thereby invalidating a number of proxies and allowing the Individual Respondents, again, to subvert the results of the election and declare themselves the winners" (NYSCEF Doc. No. 1, ¶ 52).[2] Further, the petition alleges that, despite the Board's asserted plan, a new election was never scheduled. The petition states that the Board also improperly changed the voting procedure and extended the members' terms to two years after 2021, and these changes required amendments of the bylaws by a 66 2/3 % vote.

[2] Business Corporation Law § 611 sets forth the role of the inspector of the election.

Robert and Tania Bassan, Bobowicz, McCormack, Farber, and Ahmed hired the law firm Becker & Poliakoff, LLP (Becker) to represent them. On December 31, 2020, Becker sent a letter to the Board (NYSCEF Doc. No. 40). The letter challenged the continued voting on December 22, 2020, the proposed "do-over" election, the proposed new end dates for the Board members' terms, and the proposed changes to the rules and regulations. The letter stated that Bobowicz, McCormack, and Farber were the true winners of the election. Therefore, the letter demanded that "the Board of Managers count the votes that were submitted on December 21 and immediately install the new board members that were duly elected at that time" (*id.*). Counsel reiterated its complaint and demand in letters dated January 4, 2021 (*id.*). It also stated that if the Board held a new election, they were prepared to litigate (*id.*). The Board reversed its original decision to hold a new election due to petitioners' threat of litigation (*see* NYSCEF Doc. No. 83 [Board's January 8, 2021, letter]). The January 8, 2021 letter also rejected the arguments set forth in the December 31, 2020, and January 4, 2021, letters, and adhered to the Board's original position (NYSCEF Doc. No. 41).

After the parties exchanged more letters, the Board allegedly sent out a newsletter which stated that it had no power to overturn the election and install Bobowicz, McCormack, and Farber, and therefore no new election would be held (NYSCEF Doc. No. 1, ¶¶ 63, 65). Petitioners allege that over 40 of the unit owners signed their change.org petition, which demanded that Bobowicz, McCormack, and Farber be installed as Board members, and that several others "expressed interest in joining this action as additional Petitioners" (*id.*, ¶ 66).

On April 19, 2021, petitioners filed the proceeding before this Court. In the first cause of action, under CPLR § 7803, petitioners allege that respondents had no basis "to ignore the December 21, 2020[,] election or to seek to adjourn that election" (*id.*, ¶ 71) or "to invalidate valid proxies cast in favor of the Duly Elected Board Members" (*id.*, ¶ 72). Accordingly, the petitioners seek an order declaring that "the Duly Elected Board Members forthwith be installed on the Board of the Condominium in the

place . . . of the Individual Respondents" (*id.*, ¶ 76 [a]) and that all amendments of the bylaws that changed the election procedures and/or extended the terms of Board members "be declared void and of no force and effect" (*id.*, ¶ 76 [b]). The second cause of action seeks the same relief under CPLR § 3001. The third cause of action alleges that respondents breached their fiduciary duty of loyalty "with respect to adhering to the Bylaws and not putting their interests ahead of the interests of the Condominium and the Unit Owners" (*id.*, ¶ 87). In this cause of action, petitioners seek monetary damages. The fourth cause of action seeks specific performance and damages due to respondents' alleged breach of the bylaws. In the fifth cause of action, petitioners seek the equitable relief described above in the form of an injunction. In addition to the relief set forth in the causes of action, petitioners seek pre- and post-judgment interest along with costs, disbursements, and attorney's fees. Among other things, petitioners have filed a chart labeled "Independent Results from 12/21/2020," which purportedly establishes that the three challengers won the December 21, 2020, election (NYSCEF Doc. No. 8).

On July 1, 2021, respondents filed a pre-answer motion to dismiss (NYSCEF Doc. No. 25). Respondents note that, in opposition, petitioners filed an expanded tabulation of election results, which purportedly establishes that the three challengers defeated the incumbents (NYSCEF Doc. No. 85). The Court denied the motion on the record during oral argument on December 22, 2021 (NYSCEF Doc. No. 55).

Respondents filed their answer on January 24, 2022 (NYSCEF Doc. No. 60). In addition to its denial of all the allegations in the petition, the answer asserts objections in points of law and affirmative defenses. The first objection asserts that, under Article III, section 5 of the bylaws, a majority of the unit owners at a meeting must vote to approve an adjournment only when the adjournment is due to the lack of a quorum. Therefore, the answer asserts that the provision is inapplicable and no violation occurred. Respondents also argue that, if the Court determines the meeting was adjourned, there was nothing improper about the adjournment.

The second objection noted that the supposed extension of the terms of the Board members did not occur because, pursuant to respondents' December 24, 2020, letter, such extension would only occur if a new election took place in early 2021. As there was no new election, there was no extension. The affirmative defenses assert failure to state a cause of action; dismissal is proper based on documentary evidence, failure to mitigate damages, unclean hands, the individual Board members cannot be held liable for the alleged breaches of the bylaws, petitioners are responsible for their damages, the claims are barred wholly or partly by waiver, estoppel, and laches, and the fiduciary duty claim is barred by the business judgment rule.

The affidavit of Harry Spring, one of the individual respondents, supports the answer (NYSCEF Doc. No. 61).[3] As stated, Spring was a Board member on December 21, 2020, when the meeting and election took place. In addition, Spring states that he attended the December 21, 2020, virtual meeting.[4] He states that, besides the other unit owners, the Board members, the superintendent, the property manager, and the assistant property manager attended the meeting. According to Spring, petitioners are incorrect that the individual Board members had counsel at the meeting; instead, two lawyers representing the Condominium were present. Although Spring does not state this, it appears that Maxwell Kates' attorney, Michael Bogart, managed the remote platform and assisted with the electronic voting, and thus he likely was in attendance as well (*see id.*, ¶¶ 19, 24, 31, 34).

Further, Spring denies responsibility for the video setup. He states that Maxwell Kates had set up the video for the meeting. Therefore, he states, it was not until he entered the meeting that he realized that the "platform had been set up so that only certain attendees, namely the Board, the Condominium's counsel and those slated to make presentations at the meeting, were visible on video" (*id.*, ¶ 12). Allegedly, unit owners who wished to speak could virtually raise their hands in order to be recognized.

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[3] In addition, the affirmation of Gary Ehrlich, counsel for respondents, introduces many of the documents the Court mentions in this discussion (NYSCEF Doc. No. 64).
[4] He also mentions that he was at the first meeting, which was adjourned for lack of a quorum.

Spring also denies that he and the other individual respondents deliberately raised irrelevant issues so the meeting would last for more than four hours. Instead, he states that the meeting was long because of presentations discussing the extensive repair work that was being done due to a water main break that had occurred on January 13, 2020.

After the above discussion, the Board elections began. Among other things, the candidates had the chance to promote their candidacies. In addition, the unit owners learned that they could vote either electronically or by paper ballot. The virtual attendees received links by which they could execute their ballots. The voters also had the option of printing their ballots, filling them in, and either dropping them off at the front desk of the Allegro or sending them by mail. As is pertinent here, Spring states that "due to the late hour, the deadline for receipt of electronic ballots . . . was noon on December 22, 2020" (*id.*, ¶ 21).[5] According to Spring, "[n]o unit owners objected to the voting period extending into December 22, 2020 and ending at noon that day" (*id.*, ¶ 23). The meeting ended around 11:15 p.m. Before the meeting ended, two of the unit owners had revoked their proxies. In an email from 10:52 that evening, one owner overrode her proxy and voted for Bobowicz, Farber, and Spring (NYSCEF Doc. No. 71). At 10:57, another unit owner indicated that he participated in the meeting and preferred to vote by the electronic document that Bogart had emailed to him (NYSCEF Doc. No. 72).

In support of their position that petitioners did not object to the continuation of the voting, respondents point out that at 11:24 p.m. on December 21, 2020, after he received his electronic ballot from Bogart, Farber emailed Bogart with a question about the proxy voting system (NYSCEF Doc. No. 73). At 12:43 a.m., Farber noted that that he needed all the proxy ballots "so I can vote accordingly by 10 am as you set a deadline . . . of 12noon for voting" (*id.*). Respondents further note that Farber executed and signed all the ballots in his control at 10:52 a.m. (NYSCEF Doc. Nos. 76). He indicated to

[5] There were also provisions for owners who used paper ballots, but all unit owners, including proxy voters, voted electronically.

Bogart again that at least one proxy was missing and requested "other proxies you may have received that weren't [sent] to me" (*id.*).

Through the affirmation of their counsel, respondents allege that petitioners' tabulation is inaccurate. Counsel sets forth purported examples of petitioners' errors, including inconsistent voting information for apartment 5A. They contend that Farber did not cast ballots for all the proxies in question. They submit copies of 20 electronic ballots which purportedly show the discrepancies (NYSCEF Doc. No. 81).[6] They submit a "revised tabulation" which purportedly corrects the errors in petitioners' tabulation, establishing that, if the proxy votes were counted, Spring, Bobowicz, and McCormack would have won the election (NYSCEF Doc. No. 86).

In addition, respondents argue that the fourth cause of action, for breach of contract, has no merit because there was no breach of the bylaws. They note that a claim for breach of contract must allege the existence of a valid agreement, performance by the plaintiff, failure to perform by defendant, and damages (citing *VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 58 [1st Dept 2013]). Further, they point out that if a contract is not ambiguous, it is enforced according to its terms (citing *Kolbe v Tibbetts*, 22 NY3d 344, 353 [2013]). Respondents claim that they did not breach the bylaws when they refused to count the proxies, as the proxies were defective. They cite their December 24, 2020, letter in support of this contention (NYSCEF Doc. No. 7). In addition, they point to the language in the proxy designation form which states that the proxy was "to represent and to vote as proxy, *as designated*," and they state that this required the unit owner to direct the proxy holder how to vote (NYSCEF Doc. No. 80 [emphasis supplied by respondents]).

Respondents also reiterate their second objection in point of law to the breach of contract claim, stating that a vote to adjourn was not required by the bylaws (citing NYSCEF Doc. No. 2 [Art III, § 5]).

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[6] The Court cannot locate anything in the affirmation in support or in the Spring affidavit that provides further explanation for this submission.

Alternatively, they argue that by continuing to accept ballots until December 22, they did not adjourn the meeting but merely extended the voting period (citing *Matter of Young v Jebbet*, 213 App Div 774, 779 [4th Dept 1925]; *Mishaan v 1035 Fifth Ave. Corp.*, 47 Misc 3d 930, 938-939 [Sup Ct, NY County 2015]). They note that Farber did not object to the continued voting at the time. They further contend that the extension did not change the results of the election, notwithstanding that two of the unit owners revoked their proxies. Even if there had been a breach of the bylaws, respondents contend that the individual Board members cannot be held personally liable because they were not parties to the contract (citing *Pacific Carlton Dev. Corp. v 752 Pac., LLC*, 62 AD3d 677, 678 [2d Dept 2009] [affirming trial court's conclusion that individual who was not party to an option agreement was not liable for alleged breach of option agreement]).

Next, respondents argue that the third cause of action, for breach of fiduciary duty, lacks merit. They cite *Board of Mgrs. of the 25 Charles St. Condominium v Seligson* (85 AD3d 515, 516-517 [1st Dept 2011] [internal quotations and citation omitted]), which states that under the business judgment rule, "absent a showing of discrimination, self-dealing or misconduct by board members, corporate directors are presumed to be acting in good faith and judicial inquiry into the board's actions will be prohibited." In addition, they argue that a breach of fiduciary duty claim does not lie because it is based on their purported breach of the bylaws and thus is duplicative of the breach of contract cause of action (citing *Brasseur v Speranza*, 21 AD3d 297, 298 [1st Dept 2005]). Moreover, they state that the fiduciary duty claim fails because the wrongs the petition alleges against the individual respondents are all related to their conduct as Board members (citing *Frankel v Board of Mgrs. of the Cent. Park W. Condominium*, 177 AD3d 465, 466 [1st Dept 2019]). Respondents state that, although the petition alleges manipulation and subversion of the election results, these are conclusory assertions and do not state a viable breach of fiduciary duty cause of action.

In reply, petitioners state that respondents submit no evidentiary support for their allegations. They state that respondents' new tabulations should be disregarded because respondents have submitted them for the first time in their answer and supporting documents, because it is over a year since the challenged election, and because they wrongly include the ballots submitted after the December 21, 2020, meeting ended. They argue that there was no basis in the bylaws for disregarding the proxy ballots. They note that although respondents state they discarded unconforming proxy ballots, respondents do not identify or submit evidence showing which ballots they discarded. They reiterate their challenges to the conduct of the meeting, along with other accusations.

According to petitioners, respondents "admitted that the Board had . . . improperly overturned results of the duly held election" when they sent out their March 2021 notice stating that they could not hold a new election in place of the one that occurred in December 2020 (NYSCEF Doc. No. 87, ¶ 14). They note that, in opposing respondents' pre-answer motion, Farber stated that, since the building was converted into a condominium in 1996, "no election or meeting was ever adjourned for voting to continue the next day or others, nor did the Board ever 'hold voting open' until the next day" (NYSCEF Doc. No. 46 [Farber Affidavit], ¶ 11). Petitioners allege that the 2020 deviation from the normal practice subjects the Board to higher scrutiny (citing *Mishaan*, 47 Misc 3d at 939 [stating that "when an election is challenged, the court must consider whether the corporation's common practice was followed" (internal quotation marks and citation omitted)]). Petitioners further allege that an extension of the voting period was unnecessary because the use of electronic ballots allowed for instantaneous voting.

In addition, petitioners argue, again, that respondents' conduct was internally inconsistent. More specifically, they allege that respondents had determined that a quorum of 56% was present because they included the proxies in their count. However, they determined that the same proxies were invalid, which petitioners state would have meant that a quorum was not present.

Next, petitioners contend that by requiring the proxies to specify how the proxy holder would vote, respondents unilaterally added a requirement to the proxy rules that are set forth in the bylaws. According to petitioners, because the bylaws were not amended, the respondents had no power to declare the proxies invalid (citing *Brodsky v Board of Mgrs. of Dag Hammarskjold Tower Condominium*, 1 Misc 3d 591, 594-595 [Sup Ct, NY County 2003]). In addition, petitioners state that once the inspector of election accepted the proxies, respondents had no power to declare them invalid. Citing *Jordan v Allegany Co-Op Ins. Co.* (147 Misc 2d 768, 773 [Sup Ct, Allegany County 1990] [internal quotation marks and citation omitted]), petitioners state that the election results cannot be sustained because the election was not conducted properly or fairly and the results are "clouded in doubt."

Analysis

Under Business Corporation Law § 619, the Supreme Court has the power to consider "the petition of any shareholder aggrieved by an election." This provision enables the court "to confirm an election, order a new election, or take such other action as justice may require" (*Matter of Lago v 87-10 51st Ave. Owners Corp.*, 301 AD2d 527, 528 [2d Dept 2003]; *see Tsui v Chou*, 203 AD3d 619, 619 [1st Dept 2022]). Before the court takes such action, the petitioners "must make a clear showing of impropriety or action outside the scope of authority" (*Mishaan*, 47 Misc 3d at 938 [internal quotation marks and citation omitted]). These actions must be "so clouded with doubt or tainted with questionable circumstances that the standards of fair dealing require the court to order a new, clear and adequate expression" (*Roberts v WVH Hous. Corp.*, 2021 WL 5707438, *2, 2021 NY Misc LEXIS 6366, *5-6 [Sup Ct, NY County, Nov. 29, 2021, Index No. 156795/2021] [internal quotation marks and citation omitted)]). Moreover, "the court must determine whether improprieties produced a different result from what it otherwise would have been or whether an inequitable result has been thereby produced" (*id.* [internal quotation marks and citation omitted]). The court evaluates the issues before it in light of the

bylaws (*see* Real Property Law § 339-j) and the relevant provisions of the Business Corporation Law (*see Levandusky v One Fifth Ave. Apartment Corp.*, 75 NY2d 530, 538 [1990]).

First, the Court considers the argument that respondents improperly adjourned the meeting without a vote. The Court views the extension of voting as a continuance rather than as an adjournment, as the person presiding at the meeting ended the meeting but stated that the voting would continue until the next day at noon. This satisfies Business Corporation Law § 611 (c) ("*if* no date and time [for the closing of the polls] *is so announced*, the polls . . . close at the end of the meeting, including any adjournment thereof" [emphasis supplied]). It also satisfies the bylaws, as there appears to be no provision either allowing for or precluding the Board from allowing the unit owners or their proxy to continue to vote for new Board members after the meeting (*see Agarwal v Rego Park Gardens Inc.*, 2008 NY Slip Op 31774 [U], *14 [Sup Ct, Queens County 2008]).

Even if there had been an adjournment, the actions of respondents would not have been improper. As respondents note, the bylaws only require a vote to adjourn a meeting that cannot take place "because a quorum has not attended" (NYSCEF Doc. No. 2, Article III, § 5). Petitioners' citations to the bylaws are not persuasive as they pertain to the right to use proxy votes and the proper procedure for adjourning due to the lack of a quorum (*see* NYSCEF Doc. No. 1, ¶ 80). Article III of the bylaws state that new board members are chosen in the annual meetings and that voting shall take place by the unit owners or their proxies. Article II, section 2 of the bylaws lists the powers and duties of the board and does not pertain to voting.

In addition, as respondents point out, Farber did not object to the extension of voting. On the contrary, the string of emails to which they refer show that Farber worked to get in his vote and the proxy votes by the noon deadline on December 22, 2020. As noted, in one of the emails Farber demanded that he receive all the proxy vote forms by 10 a.m. "as you set a deadline . . . of 12noon for voting" (NYSCEF Doc. No. 73). Although he may have presented the proxies prior to the meeting, he

did not submit all the votes until 10:52 a.m. (NYSCEF Doc. No. 76). This renders petitioners' objection to the extension of the voting period untenable (*see Matter of Willoughby Walk Coop. Apts.*, 104 Misc 2d 477, 479 [Sup Ct, Kings County 1980] [petitioner's objection to election "untenable" where petitioner participated in subsequent meetings and "on at least one occasion . . .accepted [the challenged board member's] seconding to motions made by petitioner"]).

As related relief, petitioners ask that only those votes received before the end of the meeting on December 21, 2020, be counted. In this case, they argue, the challengers all would have been elected. The Court denies this request for a few reasons. As stated above, the continuation of voting was not improper. Another problem with petitioners' proposed solution is that, although Farber submitted the proxies before the meeting ended and wished those proxies to be counted, he did not submit the electronic votes which effectuated the proxies until the following morning. It is not clear whether any of these votes would be counted – or what the count would be in this situation.[7]

Second, the Court notes that respondents' second objection in point of law is valid. There was no extension of the board members' terms, other than the ones caused by the current proceeding and the litigation over the 2021 board election. Therefore, the issue is moot.

Third, the Court concludes that respondents improperly excluded the proxy votes from consideration. "A cooperative may impose requirements for both balloting and tallying on voting if they wish to" (*Tomfol Owners Corp. v Walker*, 66 Misc 3d 1227 [A], 2020 NY Slip Op 50291 [U], *5 [Civ Ct, NY County 2020]). Generally, however, "absent some statutory or by-law provision, no special form is required for a proxy" (*Brodsky*, 1 Misc 3d at 594). In the proceeding at hand, the bylaws do not place restrictions on the proxy ballots or state that the proxy ballots must direct the proxy holder to vote in a specific way. There also is nothing in the proxy which includes this requirement (compare with

[7] The Court contrasts this matter with that in *Roberts* (2021 WL 5707438, 2021 NY Misc LEXIS 6366). In that case, the Court found that the board acted improperly when it accepted and counted 65 votes that someone submitted after the votes had been counted and the board had mailed out the election results (*id.*).

NYSCEF Doc. No. 48 [examples of specific proxies, which petitioners submitted in opposition to respondents' pre-answer motion]).[8] Additionally, Business Corporation Law § 609, which governs proxies, also does not contain this requirement.

Moreover, the emails that Farber and Maxwell Kate's counsel exchanged support the conclusion that the proxy voters were not required to direct Farber how to vote. At 12:43 a.m., Farber noted that that he needed all the proxy ballots "so I can vote accordingly" (NYSCEF Doc. No. 73). At 11:36 p.m., Bogart responded, "Not unless you want to vote each proxy differently. I would assume you wish to cast all of your proxies in the same fashion. If that is not the case, please let me know" (*id.*). Thus, Bogart implicitly acknowledged that Farber might have had some discretion. In addition, at 12:43 a.m., Farber noted that he had "instructions from some unit owners to vote for certain candidates and not others" (*id.*). This indicates that, although Farber submitted general proxies, he submitted some of the proxy votes according to the directions he had received from the unit owners. Indeed, some of the proxy votes were for three candidates other than Farber (*see* NYSCEF Doc. No. 81). For these reasons, the proxy votes should have been counted.

The Court cannot grant the relief of installing the three challengers to the Board because it is not clear who won the election. Petitioners support their contention that all three challengers won the election with a printed tabulation that they submitted in opposition to respondents' pre-answer motion (NYSCEF Doc. No. 49). The tabulation shows that the challengers all received the most votes. In addition, citing the tabulation, petitioners allege that because respondents did not consider the proxies, only a small fraction of the unit owners' votes were counted in the election.[9] The Court sees no counterargument from respondents. According to respondents, on the other hand, if the proxy votes are

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[8] Although the form does state that the proxy "will be voted in the manner directed herein by the undersigned Unit Owner" (NYSCEF Doc. No. 4), there is no specific direction in the document.

[9] The Farber affidavit states that "[W]ithout any of the proxies, mine and the Board's, there would have only been 11.1775% percentage interest present and voting" (NYSCEF Doc. No. 46, ¶ 8). The reply memorandum sets this number at 9.8% (NYSCEF Doc. 87, *18).

counted, Spring, Bobowicz, and McCormack would win the election, and Farber would not be elected. They submit their own tabulation, which supports their conclusion (NYSCEF Doc. No. 86). In addition, respondents allege that Farber has counted proxy votes that were revoked and replaced with direct votes. The proxies were not irrevocable, so those emails that revoked the proxies in a timely fashion are effective. Due to the conflicting tabulations and the parties' other arguments, a hearing must be held to determine the actual vote count.

In addition to the declaratory and injunctive relief, petitioners bring two claims that do not fall within the purview of the Article 78 portion of this proceeding. These are the third cause of action, for breach of fiduciary duty, and the fourth cause of action, for breach of contract. The Court has jurisdiction over these causes of action, which need not be determined along with the Article 78 portion of the lawsuit. Instead, the court views the current applications as akin to motions for dismissal.

"The proper standard of judicial review of decisions by residential cooperative corporations is the business judgment rule" (*Silverstein v Westminster House Owners, Inc.*, 50 AD3d 257, 258 [1st Dept 2008]). Under the rule, the court only reviews "whether the board acted within the scope of authority under the bylaws . . . and whether the action was taken in good faith to further a legitimate interest of the condominium" (*Frankel*, 177 AD3d at 466 [internal quotation marks and citation omitted; ellipses in original]). Thus, the burden of proof is on the plaintiff or petitioner who seeks review of a cooperative or condominium board decision (*id.*). Liability exists only where the challenger "shows[] fraud, self-dealing, or another breach of fiduciary duty" (*Baxter St. Condominium v LPS Baxter Holding Co., LLC*, 205 AD3d 640, 642 [1st Dept 2022]).

"The violation of bylaws is akin to a breach of contract . . . and the participation in a breach of contract will typically not give rise to individual director liability" (*Pomerance v McGrath*, 124 AD3d 481, 482 [1st Dept 2015] [internal quotation marks and citation omitted]). However, nothing in the caselaw "suggests that there is a safe harbor from judicial inquiry for directors who are alleged to have

engaged in conduct not protected by the business judgment rule" (*Fletcher v Dakota, Inc.*, 99 AD3d 43, 49 [1st Dept 2012]). Thus, liability may exist against the board or its members where there is misfeasance or malfeasance, as opposed to the negligent failure to act (*Peguero v 601 Realty Corp.*, 58 AD3d 556, 559 [1st Dept 2009]). Here, the petition accuses the board members of engaging in a "campaign of subversion" (NYSCEF Doc. No. 1, ¶ 39), as part of their "long history of improper tactics employed by the Individual Respondents at prior elections to keep themselves entrenched" (*id.* ¶ 44). To accomplish this end, the petition states, "the Board and their individual Respondents, who constituted a majority of the Board[,] manipulated and subverted the election, and caused the Condominium to manipulate and subvert the election" (*id.* ¶ 88). These allegations clearly allege malfeasance on the part of the Board and the individual Board members. Respondents, unsurprisingly, not only argue that their actions were proper but that they acted in good faith as part of their official duties. Thus, there is an issue of fact precluding summary resolution (*see Alexander Condominium v East 49th St. Dev. II, LLC*, 60 Misc 3d 1232 [A], 2018 NY Slip Op 51288 [U], **9-10 [Sup Ct, NY County 2018]). Accordingly, the third cause of action for breach of fiduciary duty, alleging that respondents "breached their fiduciary duty of loyalty . . . [by] putting their interests ahead of the interests of the Condominium and the Unit Owners" should not be dismissed (see NYSCEF Doc No 1 at ¶ 87).

The Court grants the prong of the application seeking to dismiss the fourth cause of action for breach of contract, which alleges that respondents "breached the Bylaws" (see NYSCEF Doc No 1 at ¶ 94). As noted above, the complained of actions did not amount to a violation of the Bylaws because no provision about them existed within the Bylaws nor the BCL (*see supra* at 17, citing, inter alia, *Brodsky*, 1 Misc 3d at 594). There is no other complained of conduct giving rise to the breach of contract claim.

A breach of fiduciary duty claim is duplicative of a contract claim if the petitioners do not allege wrongdoing by the respondents that is "separate and apart from their collective actions taken on behalf of the condominium" (*Residential Bd. of Millennium Point v Condominium Bd. of Millennium Point*,

197 AD3d 420, 424 [1st Dept 2021] [internal quotation marks and citation omitted]). Here, however, as the breach of contract claim may not be maintained, it cannot be considered as duplicative of the breach of fiduciary duty claim (*see Board of Mgrs. of Brightwater Towers Condominium v FirstService Residential N.Y., Inc.*, 193 AD3d 672, 675 [2d Dept 2021] [the claims are not duplicative only "if the allegations concern a breach of a duty that is independent of the contract"]).

As to the request for attorney's fees, petitioners point to nothing in the bylaws providing for such fees in in the situation at hand, and the court cannot locate any such provision. Therefore, the portion of the petition seeking attorney's fees is denied (*see Board of Mgrs. of the 25th Charles St. Condominium v Seligson*, 126 AD3d 547, 548 [1st Dept 2015]).

When the Court denied the pre-answer motion to dismiss on December 22, 2021, it noted that "there are issues of dispute here that probably would make a negotiated agreement a good idea" (*Farber v Spring* oral argument tr, p 28 lines 8-9). Unfortunately, due to the parties' failure to reach such an agreement – and to the dispute that arose over the 2021 election – the building has not held board elections since 2020.

For all the reasons set forth above, it is

ORDERED and ADJUDGED that the first and fifth causes of action are granted to the extent that they seek to have all proxies counted and are otherwise denied; and it is further

ORDERED, ADJUDGED and DECLARED that all the votes cast during the election and until noon on December 22, 2020, including the proxies, are given effect; and it is further

ORDERED that the petition is dismissed to the extent that it alleges that respondents improperly adjourned the December 2020 meeting; and it is further

ORDERED that the fourth cause of action is dismissed; and it is further

ORDERED that the third cause of action is severed and shall proceed; and it is further

ORDERED that the portion of the petition that seeks the installation of the proper board members

is granted to the extent of directing a hearing and the matter is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the petitioners/plaintiffs shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,[10] upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (see section J);[11] and it is further

ORDERED the parties shall appear for a preliminary conference virtually via Microsoft Teams on **September 20, 2023.**[12]

This constitutes the decision and order of the Court.

7/13/2023
DATE

ALEXANDER TISCH, J.S.C.

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

[10] The Information Sheet is accessible under the "References" page on the court's website: www.nycourts.gov/supctmanh.
[11] The *Protocol* is accessible at the "E-Filing" page on the court's website: www.nycourts.gov/supctmanh.
[12] Calendar invitation containing Teams link with blank preliminary conference order to be sent by Part 18 Clerk (SFC-Part18-Clerk@nycourts.gov). Parties may submit the order on consent in lieu of appearing.