

Bardach v Martynova

2023 NY Slip Op 34444(U)

December 18, 2023

Supreme Court, New York County

Docket Number: Index No. 159110/2023

Judge: Jennifer G. Schecter

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: COMMERCIAL DIVISION

PRESENT: HON. JENNIFER G. SCHECTER PART 54

Justice

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INDEX NO. 159110/2023

JORDAN BARDACH,

MOTION SEQ. NO. 001

Petitioner,

- v -

ANNA MARTYNOVA, JENNIFER MILOSAVLJEVIC, YOEL HERSHKOWITCH, ARON WOLOCOWITZ, RENTABILITY, INC.,

DECISION + ORDER

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 55, 57, 58, 59, 60, 61, 62, 63, 65, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 115, 125, 126, 131

were read on this motion to/for MISC. SPECIAL PROCEEDINGS.

Nominal respondent Rentability, Inc. (Rentability) is a New York not-for-profit corporation that was formed in 2018 to act as an Administering Agent for the New York City Department of Housing Preservation & Development (HPD). Rentability's bylaws provide that it is to be governed by a board of at least three directors (see Dkt. 81 at 2). The bylaws further provide that "a director may resign at any time by giving written notice to the Board of Directors or to an officer of the Corporation," that "unless otherwise specified in the notice, the resignation shall take effect upon receipt thereof by the Board of Directors or such officer" and that "acceptance of such resignation shall not be necessary to make it effective" (id. [emphasis added]).

The original three directors were petitioner Jordan Bardach, who also is the President of Rentability, and non-parties Martin Feinberg and Mary Knauf. In February 2019, Feinberg and Knauf resigned from the board. Bardach remained the only director until September 2019, when he appointed respondents Anna Martynova and Jennifer Milosavljevic to the board.

In the summer of 2022, Bardach and non-party Isaac Katz began having disputes concerning a related company, City5 Consulting, LLC (City5). Martynova, who is employed by City5, has aligned herself with Katz (see Dkt. 79 at 3 [explaining why Katz is not a board member]).

In July and August 2022, Martynova sent multiple emails to Milosavljevic, urging her to sign Rentability's compliance package, which was required by HPD semiannually and was Milosavljevic's only contribution while on the board (Dkt. 82 at 2-5; *see* Dkt. 131 at 110). On August 21, 2022, Milosavljevic finally responded with the following email on which Bardach was copied:

Sorry for the delay. I rarely check this email and have been busy with work. Unfortunately, I am unable to sign this time around. In my new position with my firm, I'm not allowed to enter into any contracts (especially RE-related or concerning HPD with whom we deal) that could have any liability or exposure for liability. I signed an employment agreement and an exclusivity agreement with my new firm to this effect not to mention the restrictions contained in the firm's malpractice insurance policy. I understand it wouldn't be in my capacity as an attorney, but I never really understood what my role was concerning Rentability. With The Price Law Firm, I was an equity partner and therefore possessed a much wider range of latitude concerning what I was able to do outside of the firm. I apologize for any inconvenience this may cause and wish you guys the best of luck (Dkt. 82 at 1).

After further communications, on September 14, 2022, Martynova sent the following email to Bardach, copying Katz:

I am afraid that Jennifer no longer can be a part of Rentability due to her new job. Isaac spoke with Tina [non-party Aleftina Budaeva] and she said she would be ok with taking over for Jennifer. I can let Jennifer know and we can finalize the substitution to ensure compliance with HPD on our projects. I spoke to Isaac and he is available to speak at 12pm today as well to discuss (Dkt. 83 at 2).

Martynova's email and her 2022 conduct unmistakably establish--contrary to her totally incredible testimony--that she no longer considered Milosavljevic to be on the board. This is reflected in an affidavit Martynova filed with HPD in October 2022, listing the board members as herself, Bardach, and Budaeva (*see* Dkt. 88 at 6).¹ Martynova's understanding that Milosavljevic was not on the board is further confirmed by another affidavit that she submitted to HPD in April 2023, which only lists herself and Bardach as board members (Dkt. 90 at 3).

By email to Martynova on August 25, 2023, Bardach called a special meeting to be held at a Starbucks in the Hamptons on September 5, 2023 (Dkt. 94 at 2). On August 28, 2023,

¹ Budaeva was only being considered as a board member and ultimately was never appointed; nonetheless, Martynova submitted this false affidavit under penalty of perjury (*see* Dkt. 79 at 5, 7-8).

Martynova sent an email to Bardach (without copying Milosavljevic), stating that the notice was insufficient for failure to include Milosavljevic “who remains a director until her successor is chosen” (Dkt. 111).

Two days later, on August 30, 2023, Martynova, who swears that she had no idea that the purpose of the board meeting was to remove her (*see* Dkt. 100 at 10 ¶ 41), informed Milosavljevic of the special meeting, explaining to her that the meeting was for Bardach “to take some sort of action” against Martynova (Dkt. 73 at 4-5 ¶ 19). Milosavljevic believes that Martynova told her that Bardach was trying to get Martynova off the board (Dkt. 131 at 129). Milosavljevic, who had no involvement with Rentability whatsoever since at the latest October 2022 (*see id.* at 110), then conveniently resurfaced and emailed Bardach that the meeting notice was invalid because it was not sent to her directly (*see* Dkt. 77). She insisted that over a year earlier “she merely expressed the need for [her] position to be considered for replacement due to changing employment circumstances” and that “cannot, under any circumstances, be construed as a resignation notice” (Dkt. 78 [emphasis in original]). She insisted that under the bylaws she was obligated to retain her board position until the Annual Meeting or a successor was ready to assume the role (*id.*).

Martynova testified that, based on Bardach’s refusal to reschedule the meeting and failure to notify Milosavljevic, “it appeared that his goal was to be the only Board member present allowing him to summarily remove [her] from the Board” (Dkt. 100 at 9 ¶ 40). Later that same day, Martynova sent an email to Bardach and Milosavljevic, purporting to call an annual meeting--the first one in Rentability's history--on Zoom on September 1, 2023 (*see* Dkt. 97 at 4). At the September 1 meeting, among other things, a new board was supposedly elected, composed of Martynova and respondents Yoel Hershkowitch and Aron Wolocowitz, and Rentability appointed Angelyn Johnson, Esq. as counsel (*see* Dkt. 113 at 2, 4).

At the September 5 special meeting, which Martynova did not attend, Bardach removed Martynova from the board due to her misconduct, including her creation and submission of false business records to HPD² and deletion of corporate records (Dkt. 95; *see* Dkt. 132 at 13).

Bardach commenced this special proceeding on September 18, 2023, seeking a judgment declaring that Milosavljevic resigned on August 21, 2022, and that the September 1 meeting was invalid as well as related injunctive relief. Respondents answered and cross-moved for relief to the contrary, including a declaration that the September 5 meeting was invalid and for related injunctive relief. On November 6, 2023, the court held a hearing (*see* Dkt. 131), after which the parties filed post-hearing briefs (Dkts. 132-134).

² Martynova also submitted documents for notarization purportedly on behalf of Bardach, which he did not sign (Dkt. 79 at 11-12; *see* Dkt. 86).

Martynova and Milosavljevic were not credible witnesses. Their testimony was inconsistent with what actually happened, their stories made no sense and their demeanor reflected a lack of truthfulness. It is clear that Milosavljevic intended to and did resign in August 2022 (despite her after-the-fact insistence otherwise) and that all of the parties operated as such for over a year. Martynova's omission of Milosavljevic as a board member on both HPD affidavits that she submitted after the resignation email is clear and convincing proof that the parties all considered her to have resigned. The authority respondents cite suggesting that a resignation requires more formality or that a director remains on the board until a replacement is elected does not actually so hold and would be inconsistent with the bylaws here, which expressly provide that a resignation notice takes immediate effect.

Thus, nothing about the September 1 meeting was valid.

Initially, the September 1 meeting was unauthorized. Since there had been no such meeting ever before, there was nothing "regular" about the September 1 meeting and it cannot be considered an annual meeting under the terms of the bylaws. This conclusion is compelled by the bylaws' description of an annual meeting as one whose time and place has been "fixed" by the board (*see id.*). There is no evidence that the board ever fixed a time for an annual meeting (*see* N-PCL § 710[b]), and there is nothing in the bylaws providing Martynova with the unilateral right to do so. Because there was no "regular Annual Meeting," the September 1 meeting can only be characterized as a special meeting (called after and intended to preempt the September 5 meeting), and only Bardach, as President, could call such a meeting absent a direction from "a majority of the directors then in office" (*see* Dkt. 81 at 3). N-PCL § 710(c) is clear that a corporate officer can only call a meeting "as provided in the by-laws" and Rentability's bylaws did not permit Martynova to do so.

Next, there was no quorum at the September 1 meeting (since only one of two directors was present), and so the votes taken at that meeting are void (*Sealey v American Soc. of Hypertension, Inc.*, 26 AD3d 254, 255 [1st Dept 2006]; *see* Dkt. 81 at 3 ["Except to the extent herein or in the Certificate of Incorporation of the Corporation provided, a majority of the entire members of the Board of Directors shall constitute a quorum"]). Moreover, "vacancies in the Board of Directors may be filled by a vote of majority of the Board of Directors then in office" and since on September 1 there were only two board members (Martynova and Bardach) there were insufficient votes at that meeting to fill board vacancies (*see id.* at 2).

By contrast, the September 5 meeting was permitted by the bylaws and Martynova, who chose not to go to the meeting, was duly removed (*see* Dkt. 81 at 3 ["At any meeting held to remove one or more directors a quorum shall consist of a majority of the directors present at such meeting"]). The location was irrelevant (*see* N-PCL § 710[a] ["Meetings of the board, annual, regular or special, may be held **at any place** within or without this state,

unless otherwise provided by the certificate of incorporation or the by-laws"] [emphasis added]; *see also* Dkt. 81 at 3 ["The notice of any meeting need not specify the purpose of such meeting"]. Bardach, moreover, had ample cause to remove Martynova from the board (*see also* Dkt. 79 at 9-10, 13-15). Indeed, Martynova admitted her misconduct during the hearing by acknowledging that she herself knowingly submitted a false certification about the board members of Rentability to HPD that was made under penalty of perjury (*see* Dkt. 131 at 157-70).

Martynova's due process arguments are rejected. The evidence established, at the very least, that she was well aware that "some sort of action" was going to be taken against her; yet, she chose not to attend (perhaps, at that time, wrongly believing that Bardach was no longer on the board). Furthermore, the cases that she relies on are inapposite. For instance, *Board of Managers of Townhomes of Eastbrooke Condominiums One, Two & Three v Padgett* (185 AD2d 650 [4th Dept 1992]) did not involve a not-for-profit corporation and cited a Court of Appeals case, *Matter of Koch* (257 NY 318, 324 [1931]), whose holding was based on unique notice language in the Religious Corporations Law. Reliance on *Capossela v Wykagyl Country Club* (258 AD2d 522, 523 [2d Dept 1999]) and *Ellis v Broder* (11 Misc 3d 534, 536 [Sup Ct, NY County 2006]) also is misplaced, as those determinations turned on specific notice language in the bylaws that is not included in Rentability's bylaws. Notably, the Second Department did not premise its holding on a purported common law rule requiring notice, but rather was clear that the violation was the failure to comply with the bylaws (*see Capossela*, 258 AD2d at 523). Here, the actions taken at the September 5 meeting were consistent with the bylaws. In addition, Martynova admitted under oath that she filed false statements with HPD. That is not even contested. Based on that admitted serious misconduct Martynova has no business being on the board of a regulated not-for profit company. Martynova is urged to consider retaining independent counsel in light of the possible criminal and regulatory implications that may flow from this action. Her admissions during the hearing were shocking. The court assumes that her counsel ensured that she provided informed consent to their continued representation since they filed a post-hearing brief on her behalf.

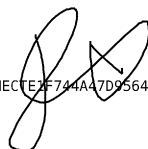
Furthermore, Ms. Johnson was never validly retained to represent Rentability. She clearly was retained to represent the interests of Katz, who has been dictating respondents' actions and using this case to gain collateral advantages in the City5 litigation. While the court has grounds to entirely disregard her submissions, nothing she argued would have changed the court's decision. The court, of course, assumes that she will comply with her ethical duties as a result of this decision.

Martynova's removal from the board and notification of HPD of these proceedings satisfies the court that measures are being taken to right the ship. Whether they are sufficient is ultimately up to HPD. To be sure, the court has concerns about Bardach being in sole control of Rentability going forward. But since respondents are no longer directors of Rentability, they lack standing to assert further claims regarding its governance, such as

the validity of actions taken with only one director. Of course, there is no reason to assume that Bardach would not promptly comply with the requirement in the bylaws to appoint replacement directors especially given all that has occurred. Presumably, this is something HPD would require and will pay attention to.

Respondents' other arguments are unavailing.

Accordingly, it is ORDERED that the petition is granted, the cross-petition is denied, and petitioner shall e-file and email the court a Word version of a proposed judgment within one week.

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JENNIFER G. SCHECTER, J.S.C.

12/18/2023
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION
 GRANTED GRANTED IN PART OTHER