

Kuschnier v 123-25 E. 102nd St. Hous. Dev. Fund Corp.

2025 NY Slip Op 34122(U)

October 23, 2025

Supreme Court, New York County

Docket Number: Index No. 153653/2025

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ PART 47

Justice

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CYRUS KUSCHNER, ANDREA ROMMAL, IDALIA HERNANDEZ, PHILIP REVILLE, BETSY WILSON, AYANA GREEN, ALEX LOULE, CHRISTINE LOULE, ANDRES SANTIAGO, JUDE JALAUIG, JUSTIN TOYAMA, RODNEY COBCOBO, NATASHA ORTIZ, EACH INDIVIDUALLY AND DERIVATIVELY ON BEHALF 123-25 EAST 102ND STREET HOUSING DEVELOPMENT FUND CORPORATION,

Plaintiffs,

- v -

123-25 EAST 102ND STREET HOUSING DEVELOPMENT FUND CORPORATION, VICTORIA GUZMAN, RAMON RUIZ, MARCUS CINTRON, MAXCINE HOLDER, NETTIE ELENION, COURTNEY KINDER, MICHAEL ZAMPELLA, YVETTE SURITA-CRESPO, SCOTT KINDER, SC KINDER LLC,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 37, 40, 41, 43, 44, 45, 46, 47, 48, 49, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 78, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 122, 123, 124, 126

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 75, 76, 77, 79, 80, 97, 121, 125

were read on this motion to/for DISQUALIFY COUNSEL

Upon the foregoing documents, it is

ORDERED that petitioners/plaintiffs' (plaintiffs) motion (MS #1) is decided as follows:

- (i) Granted to the extent plaintiffs seek an order compelling respondent/defendant (defendant) 123-25 East 102nd Street Housing Development Fund Corporation's (the cooperative, or HDFC) board of directors (the board) to comply with plaintiffs' request for inspection of books and records, to the extent it has not already done so (NYSCEF Doc No 120, p. 6 [while defendants produced books and records on May 22, 2025, plaintiffs identify remaining items to be produced]), within 20 days of entry of this order;

- (ii) Granted to the extent plaintiffs seek an order declaring December 1, 2024 election invalid because the cooperative's bylaws provide that "[w]ritten notice of any meeting will state the place, date and hour and will be given personally or by first class mail to each shareholder entitled to vote at such meeting not less than ten . . . days before the date of the meeting" (NYSCEF Doc No 15 § VI.4.B.6) and defendants admit that they only posted a notice of the meeting in the building (NYSCEF Doc No 17), and though defendants assert in their opposition that "each shareholder received a copy of the ballot for the election at least 10 days in advance of the meeting," citing the affidavit of board member Scott Kinder (NYSCEF Doc No 96 p. 5), the affidavit does not specify *how* the ballots were "sent out to every shareholder" (NYSCEF Doc No 95 ¶ 14), and in any case, the ballots do not provide notice of the "place, date and hour" of the annual meeting (NYSCEF Doc No 18 [stating only that "[e]xtra and/or replacement ballots will also be available at the annual meeting"]), and "[g]enerally, failure to give notice in accord with the [] corporate by-laws requires a new election even without a showing that the results of the election would, or might have, been different" (*In re Application of Vallone*, 92 AD2d 799, 799 [1st Dept 1983]; *Futia v Westchester County Bd. of Elections*, 307 AD2d 1055, 1055 [2nd Dept 2003] [where meeting was noticed by e-mail, which was not an approved method of notice under the bylaws, "any action taken at the [] meeting . . . was invalid"]; *Caba v 2089-91 Amsterdam Ave HDFC*, 2013 NY Slip Op 30330[U], * [where bylaws had identical language to that at issue here and the cooperative failed to demonstrate that "notice of the special meeting was sent to shareholders" as required, "the notice of the special meeting was defective . . . [and therefore] the election . . . was invalid"] [SC NY Co 2013]), and the December 1, 2024 election is declared invalid;
- (iii) Granted to the extent plaintiffs seek an order directing the board to hold a new election, and the board shall do so at the annual meeting on December 1, 2025 in compliance with the bylaws;
- (iv) Denied to the extent plaintiffs seek an order appointing a receiver because this "is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on the merits" (*American Cancer Socy., Inc. v Ashby*, 228 AD3d 805, 807 [2nd Dept 2024] [internal quotation marks and citations omitted]) which "may be invoked only in cases where the moving party has made a clear evidentiary showing of the necessity of conserving the property and protecting that party's interests" (*In re Kristensen v Charleston Square, Inc.*, 273 AD3d 312, 312 [2nd Dept 2000]; CPLR § 6401[a] [appointment of a receiver is appropriate "where there is danger that the property will be removed from the state, or lost, materially injured or destroyed"]), with leave to renew as discovery proceeds;
- (v) Granted to the extent plaintiffs seek an order issuing a writ of mandamus compelling the board to hire a Certified Public Accountant (CPA) or other person legally qualified to perform audits of the previous five years of financials for the HDFC, as this obligation is explicitly set forth in the bylaws (NYSCEF Doc No 15 § III.3) and

therefore involves “performance of a purely ministerial act which does not involve the exercise of official discretion or judgment [and petitioners’] clear legal right to the relief has been demonstrated” (*Matter of Dickson v New York City Dept. of Bldgs.*, 226 AD3d 1014, 1014 [2nd Dept 2024] [internal quotation marks omitted])¹; and the board is directed to have the audits conducted for the past five years, to the extent it has not already done so, and produce the annual financial statements based on such audits, within 90 days;

- (vi) Denied to the extent plaintiffs seek an order issuing a writ of mandamus compelling the board to commence eviction and foreclosure proceedings against defendants Holder and Elenion because “[m]andamus is not available to compel [] body to reach a particular outcome with respect to a decision that turns on the exercise of discretion or judgment” (*Alliance to End Chickens as Kaporos v New York City Police Dept.*, 152 AD3d 113, 117 [1st Dept 2017] [mandamus relief denied where “Plaintiffs claim[ed] that they [were] entitled to have the courts compel the City to enforce” certain laws prohibiting animal cruelty and protecting public health and “issue[] summonses, [] arrests, and [] violations” to those practicing Kaporos ritual]);
- (vii) Granted to the extent plaintiffs seek a preliminary injunction as against defendants Ramon Ruiz and Marcus Cintron, enjoining them from harassing, intimidating, assaulting, battering, and taking retaliatory actions against plaintiffs or other occupants of the cooperative, as plaintiffs have alleged² that Ruiz and Cintron have engaged in this conduct before (NYSCEF Doc No 51 ¶¶ 127-152, 158, 160) and “plaintiffs established a probability of success on the merits, a danger of irreparable injury, and that the equities favor them” (*Boyd v Assanah*, 210 AD3d 855, 856 [2nd Dept 2022]; *Cangemi v Yeager*, 185 AD3d 1397 [4th Dept 2020]), and denied as against defendants Scott Kinder “and all board members” as plaintiffs did not allege that they have taken part in such harassing conduct;
- (viii) Denied to the extent plaintiffs seek a preliminary injunction enjoining the sale or transfer of any of the cooperative’s apartments without prior approval of the court or a receiver because plaintiffs fail to provide a sufficient basis for such relief (NYSCEF Doc No 36 [asserting only that “there is a dispute as to who is on the board of directors and there exists issues of self dealing” and “[t]he shareholders of the HDFC have a right to pick their co-occupants”]);
- (ix) Denied to the extent plaintiffs seek a preliminary injunction enjoining the lease of any of the cooperative’s apartments without prior approval of the court or a receiver for the same reason;

¹ While defendants assert that the May 22, 2025 production included “annual financial statements from the HDFC’s accountant” (NYSCEF Doc No 96), as plaintiffs note, defendants do not claim that those statements were based on formal audits of the books and records as required under the bylaws.

² Both parties refer to video evidence of some of the alleged incidents of harassment, but the court is not in receipt of such evidence.

- (x) Denied to the extent plaintiffs seek “a protective order for Marcus Cintron to keep out of the building and not to interact with or otherwise harass Plaintiffs” (NYSCEF Doc No 41) because plaintiffs do not provide any argument in support of such relief in their papers (NYSCEF Doc No 36);
- (xi) Denied to the extent plaintiffs seek an order appointing a temporary receiver to oversee the management of the cooperative until a proper election is held and the books and records are produced for the reasons stated in section *iv, supra*;
- (xii) Denied to the extent plaintiffs seek an order awarding attorneys’ fees because even if the “lease provides for the award of an attorney’s fee, the award [is] premature, as the prevailing party in this ongoing action has yet to be determined” (*Siamos v 36-02 35th Ave. Dev. LLC*, 54 AD3d 842, 843 [2nd Dept 2008]);

And it is further

ORDERED that defendants’ cross-motion (MS #1) to dismiss the petition is granted only as against defendant Yvette Surita-Crespo because plaintiffs do “not allege that [this] individual board member[] committed an independent wrong that was distinct from the actions taken as a board collectively” (*Hersh v One Fifth Ave. Apt. Corp.*, 163 AD3d 500 [1st Dept 2018]), and is otherwise denied based on the foregoing³; and it is further

ORDERED that plaintiffs’ motion (MS #2) is decided as follows:

- (i) Denied to the extent plaintiffs seek to disqualify defendants’ counsel⁴ from representing defendants in this action because while the firm “simultaneous[ly] represent[s] the HDFC, managing agent, other non-board member agents, and the individual board members who have [allegedly] breached their fiduciary duties to the corporation” (NYSCEF Doc No 121), plaintiffs “failed to establish that the interests of those [defendants] and the co-op [are] adverse” (*Matter of Voss v 87-10 51st Ave. Owners Corp.*, 292 AD2d 622, 624 [2nd Dept 2002]; see also, *Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131 [1996] [noting that “[d]isqualification of counsel conflicts with the general policy favoring a party’s right to representation by counsel of choice, and it deprives current clients of an attorney familiar with the particular matter”]), but if a conflict of interest “should develop, at a later stage of this lawsuit, [] plaintiff[s] [are] afforded the opportunity to renew [their] motion at that

³ Defendants advised by correspondence dated June 30, 2025 “that the portion of their pending motion to dismiss the Amended Petition/Complaint that was based upon improper service of Mr. Zampella is now moot” (NYSCEF Doc No 131) since he was served on June 23, 2025 (NYSCEF Doc No 128).

⁴ At the time plaintiffs filed the motion, defendants were represented by Yolanda A. Corion Esq. Since then, Guercio & Guercio LLP (the firm) substituted in as counsel for defendants.

time” (*Subin Associates, P. C. v Two Ninety One Broadway Realty Associates*, 126 AD2d 443, 444 [1st Dept 1987]);

- (ii) Granted to the extent plaintiffs seek a preliminary injunction enjoining defendant Scott Kinder from acting as a board member or officer on behalf of the cooperative because, although Kinder stated in an affidavit that he is “a Member of the Board for the lead Defendant [co-operative] Corporation” (NYSCEF Doc No 45 ¶ 2), defendants now concede that “Kinder is not and has not been a member of the HDFC Board” (NYSCEF Doc No 97) and therefore he does not have authority to act or hold himself out as a board member;
- (iii) Denied to the extent plaintiffs seek a preliminary injunction enjoining defendant Scott Kinder and his LLC, SC Kinder LLC, from acting as the managing agent of the cooperative because plaintiffs’ only basis for this relief is their allegation that “Kinder has proven that he is allegedly willing to commit perjury⁵ to further his and his family’s interests and . . . has completely failed in his duties as managing agent” (NYSCEF Doc No 76), and their argument that the management agreement between the cooperative and SC Kinder LLC must be voided as unconscionable was only raised in their reply papers (NYSCEF Doc No 121);
- (iv) Denied as moot to the extent plaintiffs seek an extension of “time to serve the commencement documents and Order to Show Cause (Mot. Seq. 1) on Defendants” (NYSCEF Doc No 75).


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| 10/23/2025 | |
| DATE | PAUL A. GOETZ, J.S.C. |
| CHECK ONE: | <input type="checkbox"/> CASE DISPOSED <input checked="" type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED <input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER <input type="checkbox"/> SETTLE ORDER <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN <input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE |
| APPLICATION: | |
| CHECK IF APPROPRIATE: | |

⁵ This allegation is based on the aforementioned affidavit in which Kinder stated that he was a member of the board (NYSCEF Doc No 45).