

Caba v 2089-91 Amsterdam Ave. Hous. Dev. Fund Corp.

2013 NY Slip Op 30330(U)

February 13, 2013

Supreme Court, New York County

Docket Number: 104436/12

Judge: Peter H. Moulton

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. PETER H. MONLTON
SUPREME COURT JUSTICE
Justice

PART 403

Index Number : 104436/2012
CABA, LUISA
vs.
2089-91 AMSTERDAM AVENUE
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

*decided in accordance with the
written decision made at this date*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

RECEIVED
UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

Dated: 2/13/13

[Signature], J.S.C.

1. CHECK ONE: CASE DISPOSED **HON. PETER H. MONLTON** SUPREME COURT NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

Supreme Court: New York County
Part 40B

-----X
In the Matter of the Application of

LUISA CABA, MICHELE HUBERT, and
PEDRO ARIAS,

Petitioners,

-against-

Index No. 104436/12

2089-91 AMSTERDAM AVENUE HOUSING
DEVELOPMENT FUND CORP.

Respondent.

-----X
Peter H. Moulton, Justice

Petitioners are shareholders in respondent cooperative corporation, which owns two buildings comprised of 36 mostly residential units. Petitioners seek an array of declaratory and injunctive relief arising from their purported election as directors of the cooperative pursuant to a special meeting attended by 17 shareholders on October 24, 2012. Respondent moves to dismiss the petition.

BACKGROUND

In an undated notice, seven shareholders of the cooperative called a special meeting for October 24, 2012. The notice stated that the business of the special meeting would be to recall the

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LITIGATION SUPPORT DIVISION
NYS SUPREME COURT - CIVIL

current Board of Directors and elect a new board. The petition makes no mention of the fact that this special meeting was called a mere three weeks prior to the annual meeting of the corporation. The petition also makes no mention of the fact that at this annual meeting, held on November 15, 2012, the cooperative's board, which had been purportedly deposed at the October 24 special meeting, was reelected for another term.

Petitioners do not explain in their papers why they did not wait three weeks to challenge the incumbent board at the annual meeting, but rather chose to hold the special meeting.

In the petition, petitioners ask the court for the following relief. First, they seek a declaration that the October 24, 2012 election was "valid," or, in the alternative, a direction that a new election should be held. Second, they seek injunctive relief compelling respondent to permit petitioners to inspect the corporation's books and records. Third, they seek a temporary restraining order and a preliminary injunction preventing the board elected at the annual meeting on November 15 from taking certain actions.

The request for preliminary injunctive relief was denied by this court in a decision dated January 28, 2013, familiarity with which is assumed.

DISCUSSION

The motion to dismiss the petition is granted to the extent that the request for a declaration that the October 24, 2012 election was valid, or, in the alternative, for an injunction directing a new election, is denied.

The notice of the special meeting was fatally flawed, which invalidates the special meeting and the petitioners' election to the board at the meeting.

Article VI, Section 6, of the cooperatives' by-laws provide that

Written 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 nor more than fifty days before the date of the meeting.

Petitioners' papers do not establish that the notice of the special meeting was sent to shareholders. Petitioners attach copies of certificates of mailing, but there is no affidavit of service from any person with personal knowledge attesting to service of the notice, or that the certificates of mailing pertain to that alleged service. The letter itself is undated, which creates further doubt about the timing of its distribution. The corporation's by laws require that shareholders be given no less than 10 days' notice of a special meeting. Petitioners' papers do not establish this necessary prerequisite.

The notice also does not adequately state the place of the

meeting. It states that the meeting shall go forward in the building's "meeting room." It does not provide the building's address. However, this omission might be immaterial as the by-laws provide that meetings shall be held in the building. Assuming, without deciding, that all shareholders would know what was meant by the "meeting room," this might be sufficient notice of the location of the special meeting. However, the special meeting did not go forward in the meeting room, because petitioners state that they did not have the key to the meeting room. Alina Levina, petitioners' counsel's law clerk, states in her affidavit that the meeting went forward at any unspecified apartment at the premises.

Therefore, the notice of the special meeting was defective, in that it did not give all shareholders adequate notice of the place where the special meeting would go forward. Instead, the special meeting went forward in a way that ensured that only shareholders who supported the petitioners would be present at the meeting.

Because the notice of the special meeting was defective, the Court hereby declares that the election held at the special meeting on October 24, 2012, was invalid. Petitioners have not stated any basis for holding a new election. They do not seek relief in the petition with respect to the election held at the annual meeting on November 15, 2012. Indeed, as noted above, the petition does not mention the annual meeting. The court will not declare that another election should be held simply because petitioners were unable to

[* 6]
conduct a valid election at the special meeting on October 24, 2012.

Petitioners are on stronger ground in demanding access to the cooperative's books and records. The cooperative's by laws and Business Corporation Law § 624 allow the inspection of corporate records by shareholders. However, the petition and supporting affidavits do not specify when, and how, a demand was made on the corporation for an inspection. BCL § 624 provides that a shareholder of record of a corporation "upon at least five days' written demand shall have the right to examine in person or by agent or attorney, during usual business hours, [the corporation's] minutes of the proceedings of its shareholders and record of shareholders and to make extracts therefrom for any purpose reasonably related to such person's interest."

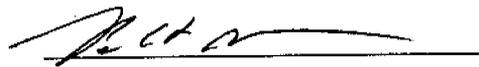
As the petition does not set forth these prerequisites, this portion of the petition is denied without prejudice. Nothing herein bars petitioners from making a proper demand under BCL § 624.

CONCLUSION

For the reasons stated, the motion to dismiss is granted. It is hereby DECLARED AND ADJUDGED that the election held at the Special Meeting on October 24, 2012, was invalid. The branch of the petition by which petitioners seek to inspect the books and records

of the corporation is denied without prejudice. This constitutes the decision and judgment of the court.

DATE: February 13, 2013



AJSC

ERNEST M. ...
SUPREME COURT JUSTICE