

At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 2nd day of March, 2015.

P R E S E N T:

HON. WAVNY TOUSSAINT,
Justice.

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JAN WELENC AND IRENEUSZ ROSZKOWSKI,
JR., AS EXECUTOR OF THE ESTATE OF
IRENEUSZ ROSZKOWSKI,

Plaintiffs,

- against -

Index No. 12933/13

THE BOARD OF DIRECTORS OF POLISH AND
SLAVIC FEDERAL CREDIT UNION,

Defendant.

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The following papers numbered 1 to 8 read herein:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____
_____ Affidavit (Affirmation) _____
Other Papers Supplemental Papers in Opposition _____

Papers Numbered

1-2, 3-4, 5, 8

6

7

Upon the foregoing papers, plaintiffs Jan Welenc and Ireneusz Roszkowski, Jr., as
Executor of the Estate of Ireneusz Roszkowski,¹ move for an order requiring defendant the

¹ The court notes that Ireneusz Roszkowski died during the pendency of this action, and, by way of an order dated October 29, 2014, the court substituted Ireneusz Roszkowski, Jr., as

Board of Directors of Polish and Slavic Federal Credit Union (Board) to cover any and all future legal expenses incurred in the representation of plaintiffs in their action as against the Board (motion sequence 1). The Board cross moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint (motion sequence 2). Plaintiffs further moved for an order assigning Mark Wysocki, as a plaintiff in this matter, due to the death of Ireneusz Roszkowski (motion sequence 3). By way of a separate motion, plaintiffs move for an earlier hearing date than the original calendar date of the motions (motion sequence 4). An additional motion by plaintiff to among other things add additional material to the record (motion sequence 5), on consent of the defendant, was deemed to be supplemental papers in opposition to defendant's motion for summary judgment dismissing the complaint.

Plaintiffs contend that the Board improperly rejected two separate petitions signed by over 2000 members of the Polish and Slavic Federal Credit Union (Credit Union), requesting that a special meeting of the Credit Union's members be called. As is relevant here, the first petition requested that a special meeting of the Credit Union's membership be called in order to remove four directors from the Board and from their membership in the Credit Union and to remove a supervisory committee person from the Credit Union's supervisory committee. The request for removal was based on allegations of various ethical violations and improper management of the Credit Union's financial affairs. This first petition also requested that,

Executor of the Estate of Ireneusz Roszkowski in place of Ireneusz Roszkowski.

at the special meeting, the members vote on temporary directors to fill the vacancies caused by the removal.

In an October 9, 2012 notice, the Board acknowledged the receipt of the petition, and acknowledged that it contained 974 valid signatures and that these signatures constituted a sufficient number of signatures to call a special meeting under the Credit Union's Bylaws (Bylaws) as they existed at the time. Nevertheless, the Board declined to call a special meeting, asserting that the petition was invalid because: (1) the portion of the petition requesting that an election be held at the special meeting to replace the removed board members violated the Bylaws; (2) this defect with the petition invalidated the entire petition, including the portion of the petition requesting the removal of the five directors; and (3) the portion of the petition requesting the removal of the remaining board members was also invalid because of inconsistencies between the Polish and English translations of the grounds for removal.

In the second petition, plaintiffs requested a special meeting be held to vote on the removal of the four directors and the supervisory committee person who were subject to the request in the first petition, as well as the removal of two additional directors. Unlike the first petition, the second petition only requested that a removal vote be held, but did not outline the grounds for removal or request that a vote also be held to fill the vacancies. The Board, in a notice dated February 1, 2013, stated that it found the second petition invalid

because it did not specify a reason for the requested action and declined to hold the requested special meeting.

Plaintiffs, proceeding pro-se, commenced this action in July 2013, requesting that the Board call the special meeting as requested in the petitions. The Board thereafter answered and the parties have since made the instant motions.

Before addressing the parties' motions, the court finds that it has subject matter jurisdiction over the action (*see Financial Indus. Regulatory Auth., Inc. v Fiero*, 10 NY3d 12, 16-17[2008] [issue of a court's subject matter jurisdiction may be raised anytime and may be raised sua sponte]). Although the Credit Union is a federally chartered credit union organized pursuant to the Federal Credit Union Act (12 USCA § 1751, et seq.) (the Act), neither the Act nor the relevant federal regulations grant federal courts or the National Credit Union Administration (NCUA) exclusive jurisdiction over disputes involving member rights under a federal credit union's by-laws (*see Harrington v Philadelphia City Employees Federal Credit Union*, 243 Pa Super 33, 41-42, 364 A2d 435, 439-440 [Pa Super 1976]; *see also Knebel v St. Helens Community Federal Credit Union*, 2013 WL 2243934 [U] [D Or 2013]; *Sly v DFCU Financial Credit Union*, 443 F Supp2d 885 [ED Mich, 2006]). In addition, as the Bylaws serve as a contract between the Credit Union and its members (*Buller v Giorno*, 28 AD3d 258[1st Dept 2006]; *Matter of American Fibre Chair Seat Corp.*, 241 App Div 532, 535-537 [2d Dept 1934], *affd* 265 NY 416 [1934]; *see also Matter of LaSonde v Seabrook*, 89 AD3d 132, 137 [1st Dept 2011], *lv denied* 18 NY3d 911 [2012]), this court

undoubtedly has subject matter jurisdiction to adjudicate the parties' rights under the Bylaws (see *Matter of American Fibre Chair Seat Corp.*, 241 App Div at 537; see also *Browne v Hibbets*, 290 NY 459, 466-467 [1943]; *Caliendo v McFarland*, 13 Misc 2d 183, 188 [Sup Ct, New York County 1958]).

Turning to the Board's cross motion for summary judgment, the determination of the motion turns on the rights of Credit Union members under the Bylaws. The right of Credit Union members to request a special meeting is addressed in Article IV, section 3 of the By-Laws, which provide that:

"Special meetings of the members may be called by the chair or the board of directors upon a majority vote, or by the supervisory committee as provided in these bylaws. The chair *must* call a special meeting, meaning a meeting must be held, within 30 days of the receipt of a written request of 25 members or 5% of the members as of the date of the request, whichever number is larger. However, a request of no more than 750 members may be required to call a special meeting.

"The notice of a special meeting must be given as provided in Section 2 of this article. Special meetings may be held at any location permitted for the annual meeting" (emphasis added).

As is relevant to notice, Article IV, Section 2 provides that, "[n]otice of any special meeting must state the purpose for which it is to be held, and no business other than that related to this purpose may be transacted at the meeting." In light of the use of the term "must" call a special meeting upon the receipt of a written request from a sufficient number of members in Article IV, Section 3 of the Bylaws, a chair has no discretion to deny a request for a special meeting made by a sufficient number of members (see *Matter of Auer v Dressel*, 306

NY 427, 431 [1954]; *Kenavan v City of New York*, 177 Misc 2d 647, 651 [Sup Ct, Kings County 1998], *reversed on other grounds* 267 AD2d 353 [2d Dept 1999], *lv denied* 95 NY2d 756 [2000]; *Matter of Friess v Morgenthau*, 86 Misc 2d 852, 854 [Sup Ct, New York County 1975]; *see also M/S Bremen v Zapata Off-Shore Co.*, 407 US 1, 20 [1972]).

Nevertheless, a court will not require a meeting to be held to vote on a request that is improper under the law or the organization's bylaws (*see Caliendo*, 13 Misc 2d at 189-190; NCUA Opinion Letter 06-0326 [March 28, 2006]; *see also Ripin v United States Woven Label Co.*, 205 NY 442 [1912]; 87 CJS, Towns § 47; *cf. Matter of Auer v Dressel*, 306 NY at 432-434).² Here, the Bylaws specifically allow the Credit Union members to remove a director or committee member (Bylaws, Article XVI, § 3),³ and to expel members from the Credit Union (Bylaws, Article XIV, § 1).⁴ However, by giving a director sought to be removed or a member sought to be expelled the opportunity to be heard (Bylaws, Article XIV, § 1 and Article XVI, § 3), the Bylaws impliedly require the request for a special meeting to specify the reasons for removal (NCUA Opinion Letter 06-0326 [March 28,

² The court notes that, although the opinion letter from NCUA does not carry the force of law, it is entitled to deference to the extent that it is persuasive (*see Christensen v Harris*, 529 US 576, 587 [2000]).

³ Article XVI, section 3 of the Bylaws provides that, "[n]otwithstanding any other provisions in these bylaws, any director or committee member of this credit union may be removed from office by the affirmative vote of a majority of the members present at a special meeting called for the purpose, but only after an opportunity has been given to be heard."

⁴ Article XIV, section 1 of the Bylaws, provides, in relevant part, that "[a] member may be expelled by a two-thirds vote of the members present at [a] special meeting called for that purpose, but only after the member has been given the opportunity to be heard."

2006]; NCUA Opinion Letter 98-0950 [Dec. 29, 1998]). In addition, nothing in the Bylaws suggests that members have the authority to fill the vacancies created by the removal of a director by electing a temporary director at a special meeting. Rather, under the Bylaws, only the remaining members of the Board have the authority to fill a vacancy with a temporary director (Bylaws, Article VI, § 4).⁵

Applying these considerations to the first petition, the court finds that the portion of the first petition requesting a vote to remove the committee member and four directors based on alleged misconduct states a valid reason for holding a special meeting. The Board's assertion that the request is rendered improper because of inconsistencies between the English and Polish versions of the request is not supported by an affidavit from a translator or other evidentiary proof demonstrating that the Polish translation is inaccurate (*see Rosenberg v Piller*, 116 AD3d 1023, 1025-1026 [2d Dept 2014]; CPLR 2101 [b]). In any event, the Polish translation, even with the inconsistencies alleged by the Board, is not so different from the English version to be misleading and it adequately conveys the reasons for requesting that the Board call the special meeting to the Polish speaking members signing the petition.⁶ The

⁵ Article VI, section 4 of the Bylaws provides, as is relevant, that, "[a]ny vacancy on the board . . . will be filled as soon as possible by a vote of a majority of the directors then holding office. Directors . . . appointed to fill a vacancy will hold office only until the next annual meeting, at which any unexpired terms will be filled by vote of the members, and until the qualification of their successors."

⁶ The court notes that, to the extent that the Polish translation did not mention that the request also involved the removal from membership of three of the directors, the court finds that this alleged defect is not material because the primary purpose of the request for a special meeting is the removal of the directors from the Board based on improper leadership.

court thus finds that the alleged inconsistencies are not material and that they are insufficient to render the request improper (*see Matter of Rock Church v Milani*, 256 AD2d 255, 256 [1st Dept 1998]).

The court agrees with the Board that the portion of the petition requesting that a vote be held to elect temporary directors to replace the removed directors violates the Bylaws, as that power rests with the remaining board members (Bylaws, Article VI, § 4). Contrary to the Board's assertion, the inclusion of the improper request does not invalidate the entire request for a special meeting (*see Matter of Weisblum v Li Falco Mfg. Co. Inc.*, 193 Misc 473, 478 [Sup Ct, Herkimer County 1947]). To hold that the improper request vitiates the entire request to call a special meeting would constitute a hyper-technical reading of the requirements relating to the requests for special meetings (*see* NCUA Opinion Letter 06-0326 [March 28, 2006]), and improperly impede the important right of members to request the calling of a special meeting (*see Matter of Auer*, 306 NY at 431-433). Even if, as argued by the Board, the requested reasons for holding a special meeting must be analyzed like a contract, the court finds that the request to hold a vote to remove the four board members is severable from and in no way contingent on the request that, upon their removal, the members be allowed to vote on their replacements (*see Hart v City of New York*, 201 NY 45, 57-58 [1911]; *Alderman v Central N.Y. Arterial Mkts.*, 24 AD2d 1046 [3d Dept 1965]; *Anheuser-Busch Ice & Cold Stor. Co., Inc. v Reynolds*, 221 App Div 174, 178 [1st Dept 1927]). As such contractual principles do not require striking the valid requests because of

the invalid request. Therefore, the Board was required to call a special meeting based on the first petition.

The Board's motion for summary judgment, as it relates to the plaintiff's first petition is denied. The Board should have called a special meeting, relative to the first petition submitted by the plaintiff's. That portion of the petition which seeks to temporarily elect board members to replace any that are removed is improper and need not be addressed at the special meeting. The Court directs that a special meeting of the Board of Directors be held within sixty (60) days of service of this order with notice of entry.

The court finds that the Board was not required to call a special meeting based on the second petition, in that the second petition failed to identify the grounds for removing the directors from the Board (Bylaws, Article XVI, § 3; NCUA Opinion Letter 06-0326 [March 28, 2006]; NCUA Opinion Letter 98-0950 [Dec. 29, 1998]). Accordingly, the Board's motion for summary judgment as it relates to the second petition only, is granted.

Plaintiffs' motion requesting that the Board be required to cover plaintiffs' attorneys' fees must be denied, as plaintiffs have failed to identify a contractual or statutory basis for the recovery of such fees (*see Gorman v Fowkes*, 97 AD3d 726, 727 [2d Dept 2012]; *Blair v O'Donnell*, 85 AD3d 954, 956 [2d Dept 2011]; *Reilly Mrtg. Group Inc. v Mount Vernon Sav. & Loan Assn.*, 568 F Supp 1067, 1078-1079 [DC Va 1983] [addressing an attorney fee request by stockholders moving to compel a special meeting]).

Plaintiffs' motion for a earlier hearing date is denied as academic, as argument has already been held on the motions. Plaintiff's motion to have Mark Wysocki substituted as plaintiff is denied, as moot, in light of the appointment of Ireneusz Roszkowski, as the estates representative, pursuant to an Order of the Surrogates Court, Kings County, dated September 19, 2014. Plaintiff's remaining motion to add additional material was previously resolved on consent.

Accordingly, a special meeting of the Board of Directors is to be held within sixty (60) days of service of this order with notice of entry.

This constitutes the decision, judgment and order of the court.

E N T E R,

A handwritten signature in black ink, appearing to be 'J. S. C.', written over a horizontal line.

J. S. C.

HON. WAVNY TOUSSAINT