At Part CED-19 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 21st day of December, 2005

PRESENT:

HON. CAROLYN E. DEMAREST,
Justice.

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ERIC GROSSMAN, ON BEHALF OF HIMSELF AS A SHAREHOLDER OF 50 LEFFERTS TENANTS CORP., ET AL.,

Plaintiff(s),

- against -

Index No. 18100/05

50 LEFFERTS TENANTS CORP., et al.,

Defendant(s).

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The following papers numbered 1 to 10 read on this motion:

| | Papers Numbered |
|---|---|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed | 1 - 9 |
| Opposing Affidavits (Affirmations) | |
| Reply Affidavits (Affirmations) | 10 |
| ______ Affidavit (Affirmation) | |
| Other Papers | |

Upon the foregoing papers, defendants 50 Lefferts Tenants Corp. (the Tenants Corp.), Henry Scott (Scott), Daffodil Edwards (Edwards), Norma Joseph (Joseph) and Earl Kaiser (Kaiser) move for an order dismissing the complaint of plaintiff Eric Grossman, on behalf of himself as a shareholder of the Tenants Corp.; on behalf of the Tenants Corp.; and on behalf of all other similarly situated shareholders on the ground

that it fails to state a cause of action. Plaintiff cross-moves for an order, pursuant to CPLR 3025, granting him leave to amend the verified complaint.

### *Facts and Procedural Background*

Plaintiff is a resident/shareholder of the Tenants Corp., owning 56 of the 5,047 shares, or 1.1% of the total; prior to July 13, 2005, Grossman was a member of the Board of Directors and served as its president. The Tenants Corp. owns and operates the land and building located at 50 Lefferts Avenue in Brooklyn. Defendants Scott, Edwards, Joseph and Kaiser are individual members of the Board of Directors; Edwards and Kaiser are sponsor representatives and all other members of the Board are resident/shareholders.

Plaintiff commenced this action alleging that each of the directors breached his or her fiduciary duty to the Tenants Corp. by illegally removing Alejandra Jiminez as a member of the Board of Directors and as treasurer and by adopting unreasonable amendments to the bylaws. Plaintiff seeks a permanent injunction annulling the amendments, a permanent injunction decreeing that Scott is enjoined from seeking reelection to the Board of Directors, and the recovery of attorneys' fees from the Tenants Corp.

More specifically, Grossman asserts that after Jiminez advised Scott, the president, that she would not serve on the Board unless meetings were held in the building, she was removed from her positions pursuant to a poll of the directors that was conducted by email. Plaintiff contends that this removal violated Article III, Section 6, of the by-laws

in that Jiminez was not removed for cause and that removal could only be effectuated by the vote of the shareholders, at a meeting called for that purpose. Further, the Board of Directors did not cure its unlawful removal until May 30, 2005, when Jiminez was reappointed.

Plaintiff's complaint further alleges that on October 7, 2004 and October 20, 2004, Scott unilaterally adopted amendments to the by-laws that are "unfair, oppressive, and manifestly detrimental to the interests of the Corporation, and which are outside the scope of its authority, and serve no legitimate interest towards furthering the purpose for which the Corporation was formed." Plaintiff contends that the amendments were improperly adopted, since they were passed during the period that Jiminez was unlawfully removed, thereby disenfranchising the shareholders who duly elected her. Plaintiff also asserts that the amendments were adopted in contravention of Article XII, Secion 1 (b) of the by-laws, which requires adoption by a majority of the Board of Directors, and that the amendments are invalid pursuant to Business Corporation Law §§ 705 (a)[1] and 706 (a).[2]

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[1] Business Corporation Law §705 (a), newly created directorships and vacancies, provides that:

> "Newly created directorships resulting from an increase in the number of directors and vacancies occurring in the board for any reason except the removal of directors without cause may be filled by vote of the board. If the number of the directors then in office is less than a quorum, such newly created directorships and vacancies may be filled by vote of a majority of the directors then in office. Nothing in this paragraph shall affect any provision of the certificate of incorporation or the by-laws which provides that such newly created directorships or vacancies shall be filled by

## *Timeliness of the Motion to Dismiss*

### *The Parties' Contentions*

As a threshold issue, plaintiff argues that defendants' motion must be dismissed as untimely. In support of this contention, plaintiff alleges that service was complete on June 10, 2005, the date that the affidavits were filed with the County Clerk. Accordingly, an answer or a motion to dismiss had to be served 20 days later, or on or before June 30, 2005. No answer was served and the instant motion was not served until July 22, 2005.

In opposition, defendants argue that the cross motion was served before the deadline with regard to the individual defendants and only days after the deadline expired for the Tenants Corp. Counsel further avers that on July 7, 2005, he faxed plaintiff's counsel a letter in which he stated that "it appears that defendants' time to answer or otherwise move in this action, expires at the end of July 22, 2005. If I am mistaken in my calculations, please notify me immediately so that I may make the necessary adjustments

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> vote of the shareholders, or any provision of the certificate of incorporation specifying greater requirements as permitted under section 709 (Greater requirements as to quorum and vote of directors)."

[2] Business Corporation Law § 706 (a), removal of directors, provides that:

> "Any or all of the directors may be removed for cause by vote of the shareholders. The certificate of incorporation or the specific provisions of a by-law adopted by the shareholders may provide for such removal by action of the board, except in the case of any director elected by cumulative voting, or by the holders of the shares of any class or series, or holders of bonds, voting as a class, when so entitled by the provisions of the certificate of incorporation."

in my work schedule and calendar." Plaintiff's counsel did not respond.

***The Law***

Pursuant to CPLR 3211 (e), a motion to dismiss on any ground set forth in CPLR 3211 (a) may be made "[a]t any time before service of the responsive pleading is required." Pursuant to CPLR 3012 (a), "[s]ervice of an answer or reply shall be made within twenty days after service of the pleading to which it responds." CPLR 3012 (d) further provides, however, that

> "[i]f the complaint is served with the summons and the service is made on the defendant by delivering the summons and complaint to an official of the state authorized to receive service in his behalf or if service of the summons and complaint is made pursuant to section 303, paragraphs two, three, four or five of section 308, or sections 313, 314 or 315, service of an answer shall be made within thirty days after service is complete."

When service is made under CPLR 308 (2) or (4), service is not complete until ten days after proof of service is filed (*see* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C3012:18). As is also relevant herein, service of process on a corporation is deemed complete when the Secretary of State is served (*Cedeno v Wimbledon Bldg.*, 207 AD2d 297, 298 [1994], *lv dismissed* 84 NY2d 978 [1994]; *Associated Imports v Leon Amiel Publisher*, 168 AD2d 354 [1990], *lv dismissed* 77 NY2d 873 [1991]; *Vazquez v Sund Emba AB*, 152 AD2d 389, 395 [1989]).

*Discussion*

An examination of the affidavits of service annexed to plaintiff's papers indicate that on June 14, 2005, Kaiser and Edward were served by delivery of a copy of the summons and complaint to a person of suitable age and discretion; on June 15, 2005, a copy was mailed to each; and the affidavit was filed on June 21, 2005. The Tenants Corp. was served on June 15, 2005 by service upon the Secretary of State; the affidavit of service was filed on June 23, 2005. On June 20, 2005, a copy of the summons and complaint was affixed to the doors of Joseph and Scott, a copy of the summons and complaint was mailed to each on June 21, 2005, and the affidavit was filed on June 23, 2005.

Applying the above principals of law, since Kaiser and Edwards were served pursuant to CPLR 308 (2), service on them was complete ten days after the affidavits of service were filed on June 21, 2005, or on July 1, 2005; their time to move to dismiss therefore expired 30 days later, or on July 31, 2005. Since Joseph and Scott were served pursuant to CPLR 308 (4), service upon them was complete ten days after the affidavits of service were filed on June 23, 2005, or on July 3, 2005; their time to move to dismiss therefore expired 30 days later, or on August 2, 2005. Since the instant motion was served on July 22, 2005, service was timely with regard to the individual defendants. Although service on the Tenants Corp. was complete on June 15, 2005, so that the motion to dismiss should have been served on or before July 15, 2005, the court excuses the brief

delay, particularly under the circumstances of this case, where the arguments offered by defendants in support of their motion are meritorious, as is discussed more fully hereinafter, and where plaintiff's counsel failed to respond to the defendants' request to confirm July 22, 2005 as the last day on which the motion could be made (*see generally New York Univ. Hosp. Tisch Inst. v. Merchs. Mut. Ins. Co.*, 15 AD3d 554 [2005]; *Petsako v Zweig*, 8 AD3d 355 [ 2004]; *Ponemon v Van Loan*, 188 AD2d 843 [1992]).

In the alternative, a motion to dismiss a complaint as failing to state a cause of action runs to the sufficiency of the complaint and may be raised at any time (*see e.g. Rainbow Hospitality Mgmt. v Mesch Eng'r*, 270 AD2d 906 [2000]; *accord Schel v Roth*, 242 AD2d 697 [1997] [a defendant's objection that a complaint fails to state a cause of action under CPLR 3211 (a) (7) may be raised in a motion at any time, even if such objection was not raised in the answer]; *Albemarle Theatre v Bayberry Realty*, 27 AD2d 172, 178 [1967] [a motion to dismiss for failure to state a cause of action may be made at any time]). Accordingly, since the instant motion can be made at any time in the proceeding, the court will also address the motion on the merits on this ground as well in the interest of judicial economy.

***Jiminez's Alleged Improper Removal***

***Defendants' Contentions***

In support of their motion to dismiss, in an affidavit submitted by Scott, defendants allege that a special meeting called was called for July 13, 2004, based upon a petition

signed by 70% of the shareholders of the Tenants Corp., in which they sought the removal of Grossman from the Board; Grossman, however, pre-empted a vote by resigning. On August 6, 2004, Scott was installed as a director to fill the vacancy created by Grossman's resignation and was appointed to serve as president. On September 7, 2004, at an annual shareholders' meeting, Scott, Edwards, Joseph, Kaiser and Jiminez were elected to the Board of Directors by a vote of the shareholders.

At the Board of Director's meeting that immediately followed that shareholders meeting, Jiminez allegedly told the Board that as conditions to her serving, she would have to be appointed treasurer and that all of the meetings of the Board would have to be held at the premises, since she had a young child at home and would not sacrifice an evening away from the child to attend; previously, meetings of the Board had taken place at the office of the managing agent in Manhattan, in order to have all of the records of the the Tenants Corp. available. After some discussion and email correspondence, the Board voted unanimously to "honor Ms. Jiminez's request to withdraw from the Board of Directors;" Scott so advised Jiminez by email dated September 13, 2004. Thereafter, the remaining members of the Board voted to fill the vacancy caused by Jiminez's resignation.

In separate affidavits, Edwards and Kaiser allege that each participated in the discussions and deliberations regarding Jiminez's ultimatum that all meetings be conducted at the premises and further aver that at no time did any member seek to have

Jiminez removed from the Board. In his affidavit, Kaiser also alleges that he was present at the September 7, 2004 meeting at which Jiminez stated the conditions for her to serve; he further asserts that he voted against the suggestion that Jiminez be permitted to participate in the meetings by telephone and he voted to permit her to withdraw.

Defendants therefore argue that Jiminez was not removed from the Board, but instead chose not to serve when her conditions were not met. Further, the Board duly considered Jiminez's demands in good faith prior to voting to accept her resignation. Moreover, Jiminez was invited to attend the last meeting of the Board before the new elections scheduled for July 28, 2005 in an effort to resolve the matter. When Jiminez attended that meeting on May 12, 2005, she denied advising Scott that she would not serve if meetings were held away from the premises; the Board accordingly agreed to appoint her as a director for the remainder of the term. When her term expired, she did not seek reelection.

Defendants thus conclude that plaintiff has not demonstrated entitlement to injunctive relief. In the alternative, they also contend that defendants' actions are protected by the business judgment rule, and hence cannot be the basis for the relief demanded by plaintiff.

***Plaintiff's Contentions***

In opposition, plaintiff argues that defendants do not attempt to challenge the legal

sufficiency of the complaint, but instead rely upon "attempted character assassinations."[3] Plaintiff also submits an affidavit from Jiminez in which she alleges that at the meeting of the Board of Directors on September 7, 2004, she advised Scott that she preferred that the Board meet at the premises because she had a newborn baby; in response, Scott indicated that it would not be a problem if she participated in the meetings via a conference call. Jiminez further avers that while she indicated that she could not attend Board meetings in Manhattan, she never resigned from the Board of Directors and was surprised when she received an email from Scott on September 13, 2004 stating that the Board had removed her. Jiminez contends that thereafter, she contacted Scott via email on several occasions to challenge her removal from the Board, but she was not allowed to return to the Board until plaintiff threatened to commence the instant action. Moreover, she contends that it is only the shareholders, and not the Board of Directors, who could remove her from the Board.

***The Alleged Improper Amendment of the By-laws***

***Defendants' Contentions***

In support of defendants' demand for dismissal of plaintiff's complaint as premised upon this claim, Scott alleges that prior to the September 7, 2004 annual meeting, a proposed draft of amendments to the bylaws was prepared, allegedly for the

[3] Plaintiff's affidavit also discusses his resignation from the Board of Directors at length, refuting each of defendants' allegations of wrongdoing on his part. Inasmuch as plaintiff's complaint does not claim that he was wrongfully forced out of his position, nor does he seek any relief in regard thereto, his withdrawal will not be addressed herein.

purpose of promoting the proper governance of the Tenants Corp. and to improve the quality of life of the residents of the premises. More specifically, the proposed amendments addressed issues including conditions that must be met to sublet an apartment; implemented a new procedure for filling vacancies on the Board of Directors; provided requirements for the maintenance of individual apartments; defined "objectionable conduct" that could result in the termination of a proprietary lease; provided guidelines for the use of building staff; provided for the installation of carbon monoxide and smoke detectors in individual units; provided procedures to be followed in making alterations to individual apartment, including the production of an insurance certificate for the benefit of the Tenants Corp.; and included a provision requiring that intra-shareholder and shareholder disputes be resolved by arbitration.

On September 13, 2004, the remaining members of the Board of Directors unamimously voted to adopt the proposed amended bylaws and copies of the new amendments were distributed to the shareholders on December 14, 2004. On March 8, 2005, a meeting of the shareholders was held to discuss the amendments. On April 12, 2005, the Board of Directors distributed the changes that incorporated changes that had been suggested. In their affidavits, Edwards and Kaiser allege that each personally voted in favor of the amendments to the by-laws and that the amendments were unanimously adopted by the Board of Directors.

Defendants thus assert that the by-laws were properly amended by the Board of

Directors, following a long and careful process which included shareholder participation and involvement. Also, all of the changes that were incorporated were designed, drafted and adopted in furtherance of a legitimate purpose of the Tenants Corp. and were not intended to benefit any single shareholder or director. Finally, all of the amendments were unanimously adopted by the Board of Directors.

***Plaintiff's Contentions***

In support of his assertion that the by-laws were improperly enacted, plaintiff relies upon the fact that they were passed during the period of time that Jiminez was not serving on the Board. In addition, he relies upon the conclusory assertions made in his complaint, i.e., that the amendments are illegal, self-serving and do not promote the legitimate purposes of the Tenants Corp.

***Plaintiff's Application to Enjoin Scott from Running for Office***

In support of their demand for dismissal of plaintiff's demand for an injunction enjoining him from seeking reelection to the Board, Scott alleges that plaintiff has failed to meet the requirements for the issuance of an injunction. Moreover, plaintiff fails to point to any abuse of authority or improper conduct on the part of Scott that would entitle plaintiff to such relief. In opposition to this demand, plaintiff relies upon his allegations of wrongdoing and misconduct on the part of Scott and the Board to support his contention that Scott should not be permitted to continue to hold office.

***Standard for Dismissal pursuant to 3211 (a) (7)***

"In considering a motion to dismiss pursuant to CPLR 3211(a) (7), the court should 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (*Sinensky v Rokowsky*, ___ AD2d ___, 2005 NY Slip Op 7518, [2005], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). On such a motion, "'the sole criterion is whether "from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law"'" (*Operative Cake v Nassour*, 21 AD3d 1020, 1020 [2005]), quoting *Mayer v Sanders*, 264 AD2d 827, 828 [1999], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]). "Such a motion should be granted only when, even viewing the allegations as true, the plaintiff still cannot establish a cause of action. The standard is not whether the plaintiff has stated a cause of action, but whether the plaintiff has a cause of action" (*McGuire v Sterling Doubleday Enters.*, 19 AD3d 660, 661 [2005], citing *Guggenheimer, id.*).

As is also relevant herein:

> "It is well settled that bare legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on a motion to dismiss for failure to state a cause of action. When the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action, not whether she has stated one (*see*, *Doria v Masucci*, 230 AD2d 764)."

(*Meyer v Guinta*, 262 AD2d 463, 464 [1999]; *accord Asgahar v Tringali Realty*, 18 AD3d 408, 409 [2005]; *Jorjill Holding v Grieco Assocs.*, 6 AD3d 500, 501 [2004]).

***The Business Judgment Rule***

***The Law***

"Under the applicable standard of review afforded by the business judgment rule, so long as a managing board acts without discriminatory intent, actions taken 'in furtherance of a legitimate purpose of the cooperative or condominium . . . will generally be upheld'" (*Pekelnaya v Allyn*, ___ AD3d ___, 2005 NY Slip Op 7860, 10 [2005], quoting *Levandusky*, 75 NY2d 530, 539 [1990]). Hence:

> "[i]n reviewing the reasonableness of [defendants'] exercise of its authority, '"absent claims of fraud, self-dealing, unconscionability or other misconduct, the court should apply the business judgment rule and should limit its inquiry to whether the action was authorized and whether it was taken in good faith and in furtherance of the legitimate interests' of the corporation."

(*Forest Hills Gardens v Evan*, 12 AD3d 563, 564 [2004]). Accordingly, when the records of a cooperative board establish that the Board acted within the scope of its authority, honestly and in good faith, and the record does not contain evidence of self-dealing by defendants, the board is entitled to the presumptions and protections afforded by the business judgment rule (*see Park Royal Owners v Glasgow*, 19 AD3d 246, 248 [2005], citing *Matter of Levandusky*, 75 NY2d 530; *accord Matter of Renauto v Board of Directors of Valimar Homeowners Assn.*, ___ AD3d ___, 2005 NY Slip Op 8986, 2

[2005] [a determination made by a homeowners association must be sustained if it was authorized and was taken in good faith and in furtherance of the legitimate interests of the association]).

***Discussion***

In accordance with the above case law, the court's inquiry into the issue of whether Jiminez was improperly removed from the Board of Directors and whether the by-laws were improperly enacted must be evaluated pursuant to the business judgment rule. In so doing, the court finds that plaintiff has failed to meet his burden of demonstrating that defendants acted in bad faith or to serve interests other than those of the corporation (*see e.g. Han Fui Hui v Tieh Chi Ho*, 1 AD3d 274 [2003], *appeal denied* 2 NY3d 703 [2004], citing *40 W. 67th St. Corp. v Pullman*, 100 NY2d 147[2003]). In this regard, a review of the emails exchanged between Jiminez and Scott, along with the affidavits before the court, establishes that the Board acted in good faith when it determined that Jiminez chose to resign when the Board declined her request that the meeting be held at the premises.

Similarly, the record supports defendants' allegation that the by-laws were passed in accordance with a lengthy review proceeding in which the shareholders participated and pursuant to the procedure set forth in Article XII, Section 1, of the by-laws.[4] The

[4] Article XII, Section 1, of the by-laws provides that:

> "These By-Laws may be amended, enlarged or diminished cither (a) at any shareholders' meeting by a vote of shareholders

amendments at issue were passed by a majority of the Board of Directors.

Hence, although plaintiff contends that the shareholders were disenfranchised when the by-laws were amended during the period of time when Jiminez was not serving on the Board, the remaining members unanimously approved the amendments. The court therefore concludes that even had Jiminez voted against adoption, her vote would not have changed the result. Thus, there is no basis upon which the vote will be set aside (*see generally Chiulli v Cross Westchester Dev.*, 130 AD2d 616, 617 [1987] [special term properly determined that it was unnecessary for it to determine whether the 30 shares of stock at issue were validly issued, since the election result would have been the same even if those shares had not been voted]).

Plaintiff also fails to support his conclusory allegations that the by-laws are unfair, oppressive, manifestly detrimental to the interests of the Corporation, outside the scope of its authority, serve no legitimate interest towards furthering the purpose for which the Corporation was formed, or that they violate Business Corporation Law §§ 705 (a) and 706 (a). Further, plaintiff's allegations do not support a finding of self-dealing,

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> owning two-thirds of the amount of the outstanding shares, represented in person or by proxy, provided that the proposed amendment or the substance thereof shall have been inserted in the notice of meeting or that all of the shareholders be present in person or by proxy, or (b) at any meeting of the Board of Directors, by a majority vote, provided that the proposed amendment of the substance thereof shall have been inserted in the notice of meeting or that all of the Directors are present in person, except that the Directors may not repeal a By-law amendment adopted by the shareholders as provided above."

misconduct, or any other impropriety.

Accordingly, the court will defer to such Board's determinations under the business judgment rule.

***Plaintiff's Demand for Injunctive Relief***

***The Law***

A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that he or she will suffer irreparable harm absent the injunction (*see e.g. Icy Splash Food & Bev. v Henckel*, 14 AD3d 595, 596 [2005]; *Hoover v Durkee*, 212 AD2d 839 [1995]), that there is no adequate legal remedy (*see e.g. McDermott v City of Albany*, 309 AD2d 1004, 1005 [2003], *appeal denied* 1 NY3d 509 [2004], and that the equities balance in his or her favor (*see e.g. Ramanadhan v Wing*, 257 AD2d 383 [1999]). Stated differently,

> "A permanent injunction 'is an extraordinary remedy to be granted or withheld by a court of equity in the exercise of its discretion. . . . Not every apprehension of injury will move a court of equity to the exercise of its discretionary powers. Indeed, 'equity . . . interferes in the transactions of [persons] by preventive measures only when irreparable injury is threatened, and the law does not afford an adequate remedy for the contemplated wrong.'"

(*Di Marzo v Fast Trak Structures*, 298 AD2d 909, 910-911 [2002]). "In many, even most, instances the entitlement to the preliminary injunction will parallel the plaintiff's right to a permanent injunction or to other relief he seeks in the main action" ( *Margolies v Encounter*, 42 NY2d 475, 479 [1977]).

***Discussion***

Herein, plaintiff fails to allege facts sufficient to entitle him to the injunctive relief that he seeks. Most significantly, plaintiff fails to allege a basis upon which this court may premise a finding that he will be irreparably harmed in the absence of the injunctive relief. In this regard, it must be noted that Jiminez was restored to her position on the Board of Directors on May 12, 2005 and served until the end of her term; she did not seek reelection. Similarly, although plaintiff alleges that the shareholders will harmed by the amendments adopted to the by-laws, the amendments are reasonable on their face and do not support the plaintiffs' conclusory claim that they are improper, oppressive, fraudulent, fail to support the Tenants Corp.'s legitimate purposes, or are inappropriate for any other reason. Moreover, as was discussed above, the record supports defendants' assertion that the amendments were passed in accordance with the by-laws. The record is therefore devoid of any facts that establish that either plaintiff or the Tenants Corp. will be harmed if the by-laws are permitted to stand. Further, plaintiff could have commenced an Article 78 proceeding seeking to challenge and correct these actions of the Board, so that he has an adequate remedy at law.

In like fashion, plaintiff has failed to allege any wrongdoing or misconduct on Scott's part that would support a finding that Scott should be removed from his positions for cause (*see generally Grace v Grace Institute*, 19 NY2d 307, 314 [1967] [petitioner, a member of the corporation, was properly removed premised upon his conduct in

commencing a series of lawsuits against the corporation in each of which he was unsuccessful and in none of which did any of the 13 jurists who took part find a single triable issue clearly supported the finding of the trustees that petitioner had embarked on a course of conduct designed to involve the corporation in endless and costly litigation and that the suits were undertaken for the purpose of harassment]; *Walker & Zanger v Zanger*, 245 AD2d 144 [1997] [the court properly enjoined the majority shareholders' attempt to remove the corporate president because they failed to advance any additional facts warranting removal despite an unappealed determination a year earlier by the same Justice denying their request to effect such removal]; *In re Natl. Arts Club*, 172 AD2d 323 [1991] [the Board of Governors of respondent had the inherent power to remove the petitioners/members of the Board of Governors, for cause where the petitioners' commencement of personal injury actions against respondent and searching its records for confidential information as to the nature and extend of insurance coverage was in breach of their fiduciary obligations and contrary to the interests of the organization]; *see also Ochs v Washington Heights Fed. S&L Assoc.*, 17 NY2d 82, 88 [1966] [the desire of a stockholder to become a member of the board of directors did not constitute bad faith]). Thus, there is no basis to support a finding that allowing Scott to remain in office will harm plaintiff or the Tenants Corp. in any manner.

Finally, plaintiff's claim that the equities are balanced in his favor is lacking in merit. In so holding, the court is persuaded by the petition annexed to defendants' papers

in opposition, which reveals that the shareholders of 70% of the Tenants Corp. sought plaintiff's removal from office. In addition, a second petition signed by the owners of 37 units in the building, or 66% of the non-sponsor owned apartments, reveals that these owners do not believe that the instant lawsuit represents his or her interest in the corporation. Hence, it appears that plaintiff does not have the support of the majority of the shareholders, which indicates that the balance of the equities does not lie in his favor. In fact, upon the totality of the documentary evidence submitted, it is apparent that plaintiff's suit lacks merit and he cannot prevail.

***Plaintiff's Demand for Legal Fees***

***Defendants' Contentions***

In support of their demand to dismiss the cause of action in which plaintiff seeks to obtain attorneys' fees, defendants assert that plaintiff's commencement of the instant action was not motivated by a desire to protect the interests of the Tenants Corp., but was rather motivated by a personal vendetta against Scott and other members of the Board. More specifically, defendants assert that plaintiff may be seeking to eliminate the amendment to the by-laws that defines "objectionable conduct" which could give rise to the termination of a shareholders' proprietary lease and having "mandate" requirements for any director seeking appointment as either president or treasure of the Board, since these amendments could impact negatively upon plaintiff, personally.

Further, plaintiff failed to comply with Business Corporation Law § 626 ( c) in that

he failed to demonstrate "with particularity the efforts of the plaintiff to secure the initiation" of the desired action by the Tenants Corp. Finally, the above discussed petition establishes that the instant lawsuit does not represent the interests of the majority of the shareholders in the corporation.

***Plaintiff's Contentions***

In opposition, plaintiff argues that he has standing to maintain an action pursuant to Business Corporation Law § 626 because he is a shareholder of the Tenants Corp. Plaintiff further alleges that his counsel outlined the alleged wrongs that he believed had been committed by the Tenants Corp. in a letter dated March 15, 2005, which letter should be deemed sufficient to satisfy the requirements of Business Corporation Law § 626 ( c).

***The Law***

As is relevant to the instant dispute, Business Corporation Law § 626 (c) provides that in a shareholders derivative action, "the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort." As is also relevant, Business Corporation Law § 626 (e) provides that:

> "If the action on behalf of the corporation was successful, in whole or in part, or if anything was received by the plaintiff or plaintiffs or a claimant or claimants as the result of a judgment, compromise or settlement of an action or claim, the court may award the plaintiff or plaintiffs, claimant or claimants, reasonable expenses, including reasonable

attorney's fees . . ."

***Discussion***

Applying the above provisions of law to the facts of this action, inasmuch as the court has dismissed plaintiff's first and second causes of action, he is not entitled to the recovery of attorneys' fees, since he has not been "successful" in this action (*see generally Seinfeld ex rel. American Express Co. v Robinson*, 172 Misc 2d 159, 164 [1997], *revd* 246 AD2d 291 [1998]).

Having so held, the court does not reach the issue of whether plaintiff's letter of March 15, 2005 was sufficient to constitute a demand pursuant to Business Corporation Law § 626 ( c) that the the Tenants Corp. initiate an action, or whether the failure to make such a demand is excused because of the nature of the claims asserted against the Board, its officers and directors.

***Plaintiff's Request to Amend his Complaint***

***Plaintiff's Contentions***

In support of his cross motion, plaintiff alleges that when he attended the annual shareholders meeting on July 28, 2005, Scott advised the shareholders that the Tenants Corp. had adopted cumulative voting for the election of directors. Plaintiff further avers that cumulative voting is not the proper way to elect directors; that the explanation of how cumulative voting worked, as explained by Scott, was wrong; and that there is no provision in the Tenants Corp.'s certificate of incorporation that allows elections to be

determined by cumulative voting.

*Defendants' Contentions*

In opposition, defendants argue that plaintiff's demand for relief must be denied on the ground that he fails to annex a copy of his proposed amended pleading to the moving papers. Defendants further argue that the cross motion must be denied on the merits, since cumulative voting has always been permitted by the by-laws, which is further evidenced by copies of previous ballots annexed to their papers, including plaintiff's ballots in the elections conducted on October 15, 2003, when he was elected president of the Board, and on September 7, 2004.

*Leave to Amend*

It is beyond dispute that permission to amend pleadings should be freely given (CPLR 3025 [b]; *see generally Edenwald Contracting Co. v New York*, 60 NY2d 957, 959 [1983]). Accordingly, such leave should be granted, provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit (*see Santori v Met Life*, 11 AD3d 597, 598 [2004], citing *Ortega v Bisogno & Meyerson*, 2 AD3d 607; *AYW Networks v Teleport Communications Group*, 309 AD2d 724 [2003], *appeal dismissed* 1 NY3d 566 [2003]; *Leszczynski v Kelly & McGlynn*, 281 AD2d 519 [2001]).

proposed amended complaint, and the proposed amendment was palpably insufficient]; *Ferdinand v Crecca & Blair*, 5 AD3d 538, 540 [2004], *appeal denied* 3 NY3d 609 [2004] [the court providently exercised its discretion in denying that branch of the plaintiff's motion which sought leave to amend her complaint since she did not submit a copy of a proposed amended pleading and did not demonstrate that the proposed amendment had merit]).

***Conclusion***

Defendants' motion to dismiss the three causes of action as pleaded in plaintiff's original complaint is granted. Plaintiff's cross-motion to amend his complaint is denied.

The foregoing constitutes the decision and order of the court.

ENTER,

J. S. C.