

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

**P R E S E N T : HON. JOSEPH P. DORSA
Justice**

IAS PART 12

PANOYIOTIS RODAMIS,
THEODORE PANAGIOTAKIS,
FRANK FIOTOS,
JOHN KAVRAKIS and
STEVEN KOHILAKIS,

Petitioners,

- against -

Index No.: 27012/04

Motion Date: 1/19/05

Motion No: 28

CRETAN'S ASSOCIATION OMONOIA, INC.,
EMMANUEL KOUROUPAKIS, JOHN STARAKIS,
AGAMEMNON STEFANKIS, JOHN PAPASIFAKIS,
IAKOVOS KALOIDAS, GEORGE DIGENAKIS,
COSTAS LAMBRAKIS, CHRIS FASARAKIS,
GEORGE BOBOLAKIS, EMMANUEL VASILAKIS,
MANOLIS DIKONIMAKIS, GEORGE MIHELAKIS,
JOHN TSONTAKIS, ANTONIOS VOMVOLAKIS,
FILIPAKIS VASILIOS, EVANGELOS VERIVAKIS,
and EVANGELOS KOURIKDAKIS,

Respondents.

The following papers numbered 1 to 14 on this motion:

	Papers Numbered
Petitioners' Order/Show Cause and Verified Petition, Memorandum of Law-Affid(s)-Exh(s)-Service.	1-6
Respondents' Notice of Cross-Motion -Affid(s)-Exh(s).	7-11
Petitioners' Replying Affidavit(s)-Exh(s).	12-13
Respondents' Replying Affidavit(s)-Exh(s).	14

By order to show cause and verified petition, petitioners seek an order of the Court pursuant to CPLR Article 78 and Section 601 of the Not-for-Profit Corporation Law expanding petitioners' time to serve respondents pursuant to CPLR §306(b); reinstating petitioners as members of said association; requiring an election of officers be held that complies with the constitution and By-Laws of the Cretan's Association Omonoia, Inc.; requiring that the Association provide petitioners a list of all members of the Association and eligible voters in furtherance of the judgment of this Court decided the 2nd day of September 2003; permitting the Treasurer of the Association, Emmanuel Kavrakis, to examine all of the Association's financial records and books and ordering a full accounting of all expenditures made by the Association.

Respondents file an opposition and cross-move to dismiss petitioners' proceeding on the grounds that: petitioners failed to move for additional time for an extension to serve the parties prior to the judgment of dismissal; failed to institute this Article 78 proceeding prior to the expiration of the four month statute of limitations; failed to exhaust all of their administrative remedies under the Association's constitution; and failed to state a cause of action under §621 of the Not-for-Profit Corporation Law which would entitle petitioners to an accounting.

Both petitioners and respondents filed replies.

Background

The Cretan's Association Omonoia, Inc. ("the Association") is a not-for-profit corporation founded in 1918 for the purpose of promoting Greek culture and advancing the development of Cretans worldwide. The controversy underlying this petition appears to have begun with an election of directors and officers which took place on or about February 2, 2003.

By order to show cause and petition commenced February 14, 2003, the same said petitioners as in the case at bar, sought to set aside and annul the election which took place on February 2, 2003. By Memorandum Decision, dated July 11, 2003, the Hon. Charles Thomas dismissed the petition and confirmed the election of February 2, 2003. The decision provided additional directions as follows: "However, due to the very lax method the organization uses in determining the eligibility of members to vote, respondent is directed to take complete attendance at all meetings and to post in a conspicuous manner the names of all persons who have paid their twenty-five dollars and who are thus

in financial good standing for the current year. Respondent shall also make available to petitioners, individually and to all members a list of all members eligible to vote in the upcoming election no less than sixty (60) days prior to the scheduled election date." (Memorandum Decision, Index No. 3921/03, Hon. Charles Thomas, July 11, 2003). Judgment was entered September 2, 2003.

Between October 3, 2003 and November 20, 2003, the petitioners, through the auspices of the Association, sought relief on their own, and were called to answer on complaints concerning them submitted to the Grievance Committee of the Association. On November 26, 2003, the Grievance Committee issued their findings which contained a list of penalties for each of the individual petitioners to be imposed for periods of 4 to 6 years, respectively, and which included: ineligibility to vote in the Association's elections; a prohibition on attending meetings on the day of elections; a prohibition in participating in general meetings; possible expulsion from the Association; ineligibility to participate in any committee of the Association; removal of title of former President for 4 of the 6 petitioners; and removal from the record of members for one of the petitioners.

On February 13, 2004, petitioners filed an order to show cause and petition pursuant to CPLR Article 78 seeking an order of the Court reinstating petitioners as members of said association; requiring an election of officers be held that complies with the Constitution and By-Laws of the Cretan's Association Omonoia, Inc.; requiring the Association provide petitioners a list of all members of the Association and eligible voters in furtherance of the judgment of this Court decided the 2nd day of September 2003; permitting the Treasurer of the Association, Emmanuel Kavrakis, to examine all of the Association's financial records and books and ordering a full accounting of all expenditures made by the Association. The petition was amended on March 12, 2004. Both the original order to show cause and petition and amended petition were filed and served well within the four month statute of limitations. CPLR §217.

On July 8, 2004, the Hon. Charles Thomas in a Memorandum Decision dismissed the petition "without prejudice to renewal" on the grounds that the Court lacked jurisdiction over the individual respondents "because the petitioners did not effectuate service in the manner specified in the order to show cause." (Memorandum Decision, Index No. 3528/04, Hon. Charles Thomas, July 8, 2004). The service clause of the order to show

cause directed personal service "on the persons purported to have been elected officers, directors, committee members and/or trustees". Id. Judgment on the decision was entered September 10, 2004.

Petitioners brought an order to show cause and petition for the same relief plus a request to expand petitioners' time to serve respondents pursuant to CPLR §306(b) under Index Number 3528/04. Said petition having been dismissed, the order to show cause and petition under Index No. 3528/04 was voluntarily withdrawn on November 29, 2004. On December 2, 2004, petitioners brought the instant order to show cause and petition seeking the same relief.

Decision

In a recent opinion, the Court of Appeals considered a trio of cases from the Appellate Division, Second Department, analyzing the application of the recently revised provision of §306-b of the CPLR (see L. 1997, ch. 476 §1).

"Under the new statute, a plaintiff must still serve a defendant within 120 days after the filing of the action. However, if service is not made within the proscribed period, the action is no longer 'deemed dismissed' [the automatic dismissal provision of former CPLR §306-b(a)]. Rather, the statute provides that if service is not made upon a defendant within the time provided in this section, the Court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service. An extension of time for service is a matter within the Court's discretion (Leader v. Maroney, Ponzini, 97 NY2d 95, 101 (2001)).

The question for the Court became whether or not the two avenues for seeking an extension of time, under the new CPLR §306(b), namely for "good cause shown" or in the "interest of justice," required as a prerequisite a showing of reasonable diligence by plaintiffs. The Court's answer was "that under the interest of justice standard, a showing of reasonable diligence in attempting to effect service is not a "gate keeper." Id., at 104.

"The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause; a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the Court may consider diligence, or

lack thereof along with any other relevant factor in making its determination, including expiration of the statute of limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant." Id. at 105, 106.

In two of the three cases (Leader, Scarabaggio) before the Court, where service had not been properly effected and the statute of limitations had run, the Court upheld the trial Court's determination to extend plaintiff's time in which to serve. Id.

In Leader, plaintiff's first action, pro se, was filed two months prior to the expiration of the statute of limitations, but was never served before the expiration of the 120 day period. A second action was commenced by counsel, but dismissed on statute of limitations grounds, while the first action remained pending. The Court extended plaintiff's time to serve the first action on interests of justice grounds excusing plaintiff's counsel's law office failure (he relied on the former statute) and the observance that there was no prejudice to defendant. Id. at 101.

In Scarabaggio, plaintiff commenced his action three months prior to the expiration of the statute of limitations, but failed to serve defendant within the 120 day period; when plaintiff became aware of a failure of service, he promptly requested an extension of time. Id. at 102. In Scarabaggio, defendant was aware of plaintiff's claim. Id.

In Hafkin, plaintiff commenced her action one day before the expiration of the statute of limitations. Defendant was never served in that action. Plaintiff commenced a second action during the 120 day period; defendant's motion to dismiss the second action as time barred was granted and the Court refused to extend time to plaintiff to serve the first action, explaining among other reasons, "that the interest of justice would not be served by rewarding plaintiff's unexplained and unexcused complete lack of diligence." Id. at 103.

Here, it is undisputed that petitioners initially commenced this Article 78 proceeding well within the statute of limitations period. Having been embroiled in this controversy since February 2003, at least, respondents in this action - unlike the defendants in a typical negligence action - cannot be heard to complain that they were unaware of petitioners' complaints.

Moreover, petitioners promptly brought an order to show

cause and petition requesting an extension of time to serve less than a month (October 7, 2004) after judgment was entered (September 10, 2004).

Justice Thomas' Memorandum Decision of July 8, 2004, which came some 80 days after the statute of limitations expired did not specifically delineate a time frame for filing and serving a new petition but directed that the petition was dismissed without prejudice to renewal and directed the parties to "settle order." The judgment based on the Memorandum Decision was not signed by Justice Thomas until September 10, 2004.

"ORDERED... the application by petitioner under CPLR Article 78 and the Not-for-Profit Corporation Law, to restore and reinstate full membership rights for petitioners, and for other relief is denied and the petition and the amended petition are dismissed without prejudice to renewal..."

Radamis, et al v. Cretan's Association Omonoa, Inc., Judgment, Hon. Charles Thomas, September 7, 2004.

The phrase, "dismissed without prejudice to renewal," can only be interpreted to mean that a renewal of the petition would be accepted by the Court. As noted above the Judgment dismissing the petition was entered September 10, 2004. Neither party herein offers proof of the date of notice of entry. The order to show cause and petition which is the subject of these moving papers under Index No. 27012/04 was commenced and deemed served on December 2, 2004, well within both the 120 day period contemplated by CPLR §306-b, and the four month statute of limitations of CPLR §217.

"To compute the running of the... 120 day recommencement period from the date of service of notice of entry of the order granting the motion to dismiss the original action, rather than from the date of the order's issuance was proper" (Gallo v. Ventimiglia, 283 AD2d 331, 332 (1st Dep't. 2001). "Applying the statute as defendant advocates... [in this instance to bar plaintiff from recommencing on statute of limitations grounds...] while appealing at first blush, under the particular circumstances of this case would be inconsistent with the interpretative maxim that remedial statutes should be liberally construed to accomplish their remedial objectives." Id., at 332.

Finally, in opposing petitioners' motion for an extension of time to serve the petition herein, respondents fail to state any basis for a finding of prejudice to them.

Respondent's reliance on Hambric v. McHugh, 289 AD2d 290 (2nd Dep't. 2001) and Sottile v. Islandia Home for Adults, 278 AD2d 482 2nd Dep't. 2000 is misplaced in this instance. In Hambric, plaintiff commenced an action for personal injury, and when defendants failed to appear or answer, moved for a default judgment; defendants cross-moved for dismissal for lack of personal jurisdiction based on improper service. Id. A hearing was held before a Judicial Hearing Officer who found service improper. Id. Defendants moved to confirm the hearing officer's report and plaintiff cross-moved for an extension of time in which to serve defendants. Id. The trial court confirmed the hearing officer's findings and denied an extension time in which to file the action. Id. at 291. Thereafter, plaintiff commenced a second action, which defendant sought to have dismissed as time barred. Id. The trial court then denied the dismissal and granted an extension of time to serve the second action in the interest of justice. Id.

The Appellate Division reversed, holding that the new CPLR §306-b "no longer affords a plaintiff the opportunity to commence a second action concerning otherwise time barred claims after the dismissal of the first action." Id.

In the instant matter, however, the action filed by plaintiff on December 2, 2004 cannot be considered to be time barred as it was filed well within the 120 day period running from September 10, 2004 (the date judgment was entered) as well as within the four month Statute of Limitations. CPLR §217. Gallo, at 332. Moreover, having specifically granted plaintiff leave to renew as part of the judgment, plaintiff is now justified in seeking an extension of time pursuant to CPLR 306-b under an interest of justice claim (Leader v. Maroney, Ponzini, 97 NY2d 95 (2001)).

In Sottile v. Islandia Home for Adults, 278 AD2d 482 (2nd Dep't. 2000) the Court dismissed plaintiff's action for lack of personal jurisdiction based on improper service after a hearing and a judgment was entered thereon. Id., at 483. Plaintiff moved for an extension of time to serve thereafter; and the Court concluded that denial of an extension of time to serve was proper because there was no longer an action pending, and because plaintiff failed to demonstrate good cause or an interest of justice reason for an extension. Id. (emphasis added). In this instance, as already noted, the Court did not merely dismiss petitioner's action, the action was dismissed without prejudice to renewal. Moreover, this Court had not been asked to consider whether good cause or an interest of justice standard applied when leave to renew petition was granted.

In the matter now before the Court such a consideration is necessary pursuant to CPLR §306-b.

Accordingly, for all of the reasons stated above, the first branch of petitioners' order to show cause, to extend their time to serve the order to show cause and petition is granted nunc pro tunc to January 7, 2005, 120 days from the date of entry (September 10, 2004) of the judgment in which petitioners' action was dismissed without prejudice to renewal. Leader, supra., Gallo, supra. It follows, therefore, that those branches of respondents' motion seeking dismissal on the basis of petitioners' failure to seek an extension of time prior to the entry of judgment, and to dismiss the petition as time barred are denied.

Respondents also seek dismissal of petitioners' request for relief pursuant to CPLR Article 78 on the grounds that petitioners failed to exhaust their administrative remedies. In particular, respondents claim that petitioners' failure to appeal the determination of the Grievance Committee imposing various sanctions on petitioners to the Board of Former Presidents constitutes such failure.

CPLR Article 78, Section 7801(1) bars relief to a petitioner who challenges an agency determination if such determination is one which can be adequately appealed through administrative channels. CPLR §7801(1).

The finality requirement, that is the determination that all available administrative remedies have been exhausted, may be disregarded in the Court's discretion where it reasonably appears that the pursuit of an administrative remedy would be futile (Martin v. Ambach, 85 AD2d 869, 870 (2nd Dep't. 1981); Lehigh Portland Cement Co. v. New York Department of Environmental Conservation, 87 NY2d 136 (1995)).

Leaving aside for the moment petitioners' claim that an appeal to the Board of Former Presidents was in fact made and effectively ignored, the Court is mindful that the action of the Grievance Committee stripping four of the six petitioners of their title of Former President would render such an appeal futile under these circumstances. *Id.*

Accordingly, that branch of respondents' motion seeking to dismiss petitioners' proceeding on grounds that they failed to exhaust their administrative needs is denied.

Respondents also seek an order dismissing petitioners' request for a full accounting of expenditures made by the Association on the grounds that petitioners have failed to state a cause of action for relief pursuant to §621 of the Not-for-Profit Corporation Law.

"A person who is not a member, officer or director of a not-for-profit corporation and (emphasis added) who has no beneficial interest in the corporation is not entitled to inspect the corporation's books and records either under N-PCL §621 or by virtue of any common law right." McKinney's Practice Commentaries by E. Lisk Wyckoff, Jr., Art. 6 Not-for-Profit Law, p. 263, citing Getman v. Mohawk Valley Nursing Home, Inc., 44 AD2d 392 (1974)).

In this instance, petitioners have failed to establish the requisite beneficial interests entitling them to such relief.

Accordingly, that branch of respondents' cross-motion seeking dismissal of petitioners' cause of action for an accounting pursuant to §621 of the Not-for-Profit Corporation Law is granted.

That branch of petitioners' motion which seeks an order permitting the "treasurer," Emmanuel Kavrakis, to examine the Association's financial books and records is denied. It has not been established that Mr. Kavrakis has standing to request such relief in this action.

Finally, upon all of the foregoing, the remaining branches (2-4) of petitioners' order to show cause are granted to the extent that all parties and counsel are directed to appear on **April 6, 2005, at 11:00 a.m.**, 88-11 Sutphin, Jamaica, NY, Courtroom 45 for a hearing on the issues presented.

All restraining orders granted as part of the order to show cause remain in full force and effect until further order of the court.

Dated: Jamaica, New York
February 10, 2005

JOSEPH P. DORSA
J.S.C.