SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

J. ARMAND MUSEY,	:	Index No: 150369/2016
Petitioner,	:	
-against-	:	
425 EAST 86 APARTMENTS CORP.,	:	
Respondent.	:	

MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS PETITION

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Petitioner J. Armand Musey respectfully submits this memorandum of law in opposition to Respondent's motion to dismiss his verified petition (the "Petition")[1], dated January 14, 2016, through which he seeks to enforce his rights pursuant to Section 624 of the New York Business Corporation Law, New York common law, and his Proprietary Lease to inspect Respondent's books of account.

PRELIMINARY STATEMENT

Respondent's motion to dismiss is nothing more than a vitriolic attempt to denigrate Petitioner and complicate what is a very simple issue: Petitioner has the right, pursuant to Section 624 of the New York Business Corporation Law, New York common law, and his Proprietary Lease, to inspect Respondent's books of account. Rather than address the pertinent issues, Respondent's motion to dismiss seeks to distract this Court by reciting (at some length, and with limited attention to factual accuracy) the history of unrelated pending litigation between Petitioner and Respondent, including mischaracterizing confidential settlement and mediation discussions pertaining to the parties' separate action. The only link that exists between this proceeding and the pending litigation is Respondent's obstructive behavior.

Respondent's efforts to cloud the issue must fail: Petitioner has made more than one valid, written demand for access to Respondent's books of account, for the purpose of protecting his investment in Respondent. As discussed at length below, Petitioner's desire to protect his investment is indisputably a "proper purpose" for seeking to inspect corporate records. Respondent answered these legitimate demands by not only denying Petitioner's rights, but also denying the rights of Petitioner's fellow shareholders. Affidavit of J. Armand Musey, ("Musey Aff."), Ex. 5. Respondent cannot be allowed to continue to deny Petitioner his right, as a

[1] Unless otherwise noted, all capitalized terms have the same meaning as in the Petition.

shareholder, to review Respondent's books and records, much less the rights of all of the Respondent's shareholders to the same.

STATEMENT OF FACT

This Court is respectfully referred to the Petition and the Affidavit of J. Armand Musey for a complete statement of the underlying facts in this action. The facts pertinent to this proceeding are as follows.[2]

Petitioner is seeking to investigate potential fiscal misconduct by Respondent. Upon review of Respondent's 2014 financial statements, in addition to those of previous years, Petitioner, a chartered financial analyst ("CFA"), with an MBA degree and significant professional training and experience analyzing financial statements, noticed certain accounting discrepancies. Opposition Affirmation of Stephanie A. Prince in Opposition ("Prince Opp. Aff."), Ex. 1, Petition; Musey Aff., ¶¶ 2-3. Given his professional training and experience, Petitioner is familiar with Generally Accepted Accounting Practices ("GAAP"), including Financial Accounting Standards Board, Accounting Standards Codification ("FASB ASC") 850, which provides disclosure requirements for related party transactions. Musey Aff., ¶ 4. Specifically, Petitioner's concerns regarding to FASB ASC 850 relate to certain contracts Respondent entered into with Standard Waterproofing Corp. which constitute related party transactions. Prince Opp. Aff, Ex. 1, ¶ 6; Musey Aff., ¶ 4. Petitioner is aggrieved by this omission, as his apartment is specifically impacted by Respondent's agreements with Standard Waterproofing Corp. Musey Aff., ¶ 4. Significantly, Respondent refinanced its mortgage,

[2] Respondent claims that the only support for the Petition is the affirmation of Petitioner's counsel, to which Respondent claims are attached exhibits which are not properly authenticated. While Petitioner disagrees with Respondent's arguments for a number of reasons, the least of which being that a verified pleading can be used as an affidavit pursuant to CPLR § 105, in an abundance of caution, Petitioner submits herewith the Affidavit of J. Armand Musey and Affirmation of Stuart Sugarman, which attest to the accuracy and completeness of the exhibits previously attached to the Petition.

increasing the balance by approximately $2,000,000 and extending its amortization by approximately 25 years, and appears to have used the majority of the proceeds to pay for these related-party transactions in question while hiding the same from shareholders of Respondent. Musey Aff., ¶ 7.

Petitioner contacted Respondent's accountant and notified him of these discrepancies. Prince Opp. Aff, Ex. 1, ¶ 7; Musey Aff., ¶ 5. While the accountant prepared amended financial statements in only one of the affected years, Petitioner found that the amended financial statements also contained material inconsistencies with the official minutes from Respondent's board of directors' meetings, documents which are not "books of account" but part of the broader category of "books and records" that Respondent allowed Mr. Musey to inspect. Prince Opp. Aff, Ex. 1, ¶ 7; Musey Aff., ¶ 5. None of Petitioner's attempts to communicate with Respondent's accountant has elicited any clarification or denial of the inaccuracies Mr. Musey uncovered. Prince Opp. Aff, Ex. 1, ¶ 7; Musey Aff., ¶ 12.

Respondent has likewise made no attempt to explain or justify the seeming inaccuracies of its records or deny the validity of any of Mr. Musey's findings. Petitioner's concerns regarding potential misconduct, as evidenced by the deficiencies in Respondent's financials, Respondent's lack of diligence in resolving these errors, and the possible resulting negative impact on shareholders[3] led Petitioner to demand access, via the managing agent for the Building, to Respondent's books of account to review Respondent's financial documents.[4] Prince Opp. Aff, Ex. 1, ¶ 9; Musey Aff., ¶ 15. Respondent replied by affirming in writing that it

[3] Petitioner is particularly concerned about potential liability as Respondent continues to approve sales of shares in Respondent, sales often influenced by potential purchasers' analysis of Respondent's audited financial statements.

[4] It is Petitioner's understanding that Respondent began making decisions regarding the related party transactions in 2009 and as such, Petitioner is seeking to review Respondent's books of account relevant to these discrepancies from 2009 through the present. Musey Aff., ¶ 6.

believes none of its shareholders have any rights to review any documentation except for a "certified, annual balance sheet, a certified statement of operations and a statement of per share tax deductions." Prince Opp. Aff, ¶ 10, Ex. 5; Musey Aff., Ex. 5. However, in addition to his rights pursuant to New York law, Paragraph 5 of Petitioner's Proprietary Lease states that: "The Lessor shall keep full and correct books of account at its principal office or at such other place as the Directors may from time to time determine, and the same shall be open during all reasonable hours to inspection by the Lessee or a representative of the Lessee." Musey Aff., Ex. 6. Petitioner followed-up by a formal demand made to Respondent through counsel. Prince Opp. Aff, ¶ 10; Musey Aff., Ex. 4; Affirmation of Stuart Sugarman, ("Sugarman Aff."), Ex. 1. Respondent has not replied to the formal demand or a follow-up telephone call. Prince Opp. Aff, ¶ 10; Sugarman Aff., ¶ 3.

ARGUMENT

POINT I

PETITIONER'S CLAIM IS RIPE

Petitioner's claim is ripe for review. "A challenged determination is final and binding when it "has its impact" upon the petitioner who is thereby aggrieved." *Edmead v. McGuire,* 67 N.Y.2d 714, 716 (N.Y. 1986) (board of trustee's determination was considered "final and binding" on the date petitioner was notified of the board's decision). Indeed, Petitioner's right to the books and records of the Cooperative Corporation is ripe for review. Petitioner commenced this proceeding after making not one, but two written demands for access to Respondent's books of account. Musey Aff. Ex. 4, Sugarman Aff., Ex. 1. Petitioner's first demand, made to Respondent's managing agent on December 10, 2015, was answered by a question as to what "books of account" Petitioner was seeking. Musey Aff. Ex. 4. However, before Petitioner could respond, Respondent's corporate counsel sent him a letter on December 11, 2015, not only

denying Petitioner's request, but categorically denying that any shareholder has the right to access Respondent's books of account. Musey Aff., ¶ 14, Ex. 5. On December 16, 2015, counsel for Petitioner responded to Respondent's December 11, 2015 letter and made yet another demand for access, addressing the issue of a problem with a disclosure in Respondent's financials. Sugarman Aff., Ex. 1. When Respondent failed to answer the December 16 letter or a follow-up phone call, Petitioner reasonably concluded the Respondent had reached a final determination and refused reconsideration. Accordingly, the Petitioner filed the Petition approximately one month later.

Respondent's claim that Petitioner has not provided it with a sufficiently specific demand is a red herring: Petitioner specifically asked to see the Respondent's "books of account" in his December 10, 2015 e-mail to the managing agent – books of account being a specific subset of the Respondent's books and records. Musey Aff., Ex. 3. Moreover, Respondent's prior statements have already made clear that it has no intention of acquiescing to any demand, regardless of its breadth. Musey Aff. Ex. 5. Indeed, Respondent believes its shareholders only have the right to view a "certified, annual balance sheet, a certified statement of operations and a statement of per share tax deductions," Musey Aff. Ex. 5, despite New York law and the clear language of the Proprietary Lease providing otherwise. Musey Aff. Ex. 6. In these circumstances, it is clear the Respondent has made a final determination, that they were unwilling to discuss, much less reconsider the determination, and that any further demand on the part of Petitioner would be futile.[5]

[5] If Respondent's position was not final, it had ample opportunity to communicate that to Petitioner's counsel and settle the matter by providing access as opposed to expending additional resources to file its motion to dismiss and attempt to avoid disclosure mandated by New York law and the Proprietary Lease.

Respondent bolsters its unavailing argument that Petitioner's claim is not ripe with cases that are wholly inapposite. *See Weingarten v. Lewisboro,* 77 N.Y.2d 926, 928 (N.Y. 1991) (Respondent's Br. At 8) (where plaintiff received a final approval resolution from the its town planning board which imposed a fee, but then sought judicial review of imposition of the fee, which review was still pending at the time plaintiff commenced a separate declaratory judgment action, the administrative action in question – the town planning board's resolution – was not final and the plaintiff's declaratory judgment action was premature); *Cubas v. Martinez,* 33 A.D.3d 96, 103 (1st Dep't 2006) (Respondent's Br. At 8) (where plaintiffs challenged the New York Department of Motor Vehicles "SSN Verification Project," which initiative had not yet taken any action against a party holding a New York state driver's license or non-driver identification card, the challenge was deemed premature); *Parent Teacher Ass'n of P.S. 124M v. Bd. of Educ. of the School Dist. of the City of N.Y.,* 138 A.D.2d 108, 111-12 (1st Dep't 1988) (Respondent's Brief at 8) (in a dispute between a parent teacher association for an elementary school and the superintendent of a Manhattan community school district over whether a candidate for the position of the elementary school's principal should be interviewed, the parent teacher association's Article 78 proceeding was dismissed where the controversy was found to be non-justiciable, and petitioner's claims premature, as the interview process is an intermediate step and not a final, administrative determination).

Here, there is no question that Respondent has already denied Petitioner's demand to access its books of account, and further, believes neither Petitioner nor his fellow shareholders have any right to ever access any of Respondent's books of account. Musey Aff. Ex. 4-5, Sugarman Aff., Ex. 1. As such, Petitioner's request is ripe and Respondent's arguments to the contrary are unavailing.

POINT II

NEW YORK LAW AND THE PROPRIETARY LEASE PROVIDE PETITIONER THE RIGHT TO INSPECT RESPONDENT'S BOOKS OF ACCOUNT

"Under New York law, shareholders have both statutory and common-law rights to inspect a corporation's books and records so long as the shareholders seek the inspection in good faith and for a valid purpose." *Retirement Plan for Gen. Empls. Of the City of N. Miami Beach v. McGraw-Hill Cos., Inc.*, 120 A.D.3d 1052, 1055 (1st Dep't 2014). While the common law right to inspect books and records is broader than that prescribed by New York Business Corporations Law ("BCL"), even viewed solely as an issue of statutory construction, BCL § 624(f) indicates that the court's power to compel the production of books and records beyond those documents required pursuant to BCL §§ 624(b) and (e) is not restricted.[6] *Id.* at 1056; *Novikov v Oceana Holdings Corp.*, 46 Misc. 3d 561, 568 (N.Y. Co. Sup. Ct. Nov. 3, 2014).

Here, Respondent has the burden to demonstrate that Petitioner's demand is motivated by an improper purpose, *Crane Co. v. Anaconda Co.*, 39 N.Y.2d 14, 20 (N.Y. 1976), and it cannot do so. Investigating alleged misconduct by management and obtaining information that may aid legitimate litigation are proper purposes for a demand, even where the inspection ultimately demonstrates that the board had not engaged in any wrongdoing. *Retirement Plan for Gen. Empls. Of the City of N. Miami Beach*, 120 A.D.3d at 1056; *Pomerance v. McGrath*, 2015 N.Y. Misc. LEXIS 4415 (N.Y. Co. Sup. Ct. Dec. 1, 2015) ("[a] valid purpose is that which is reasonably related to the shareholder's interest in the corporation, including efforts to ascertain the corporation's financial condition, to investigate management's conduct, and to obtain information in aid of legitimate litigation"); *Novikov*, 46 Misc. 3d at 569 (petitioner's purpose

[6] Further, paragraph 5 of Petitioner's Proprietary Lease also provides shareholders of Respondent, including Petitioner, the right to inspect Respondent's books of account. As Respondent refuses to accord Petitioner this right, Respondent is in breach of Petitioner's Proprietary Lease. Musey Aff., Ex. 6.

deemed sufficient when petitioner sought to investigate misconduct by the management of a corporation in which he was a shareholder).

Petitioner is seeking to investigate potential misconduct, and has alleged that upon review of Respondent's financial statements, Petitioner, a chartered financial analyst ("CFA"), noticed certain accounting discrepancies relating to the treatment of potential related party transactions between Respondent and Standard Waterproofing Corp. Prince Opp. Aff., Ex. 1; Musey Aff., ¶¶ 2-3. As discussed above and in the Petition, none of Petitioner's attempts to discuss the matter with Respondent's accountant elicited a clarification, and Respondent has categorically refused to provide access to any records beyond a certified annual balance sheet. Musey Aff., ¶ 12, Ex. 5.

In response to Petitioner's legitimate concerns and the detailed allegations in the Petition, Respondent has put forth, without any proof, conspiracy theories, unfounded allegations of a highly personal nature and baseless accusations regarding Petitioner's motives, pertaining to the pre-existing action between the parties, *Musey v. 425 East 86 Apartments Corp.*, Index No. 157316/2014, before this Court, (the "Pre-existing Action") in which Petitioner's motion for leave to amend the complaint and Respondent's motion to quash two third party subpoenas[7] are pending.

These accusations do not raise an issue of fact regarding Petitioner's good faith or motive. Further, Petitioner's agreement to not pursue the two amended third party subpoenas in the Pre-existing Action until the pending motion to quash is decided, which agreement neither he nor his counsel have violated, does not deprive Petitioner, and all of his fellow shareholders, of

[7] In a further attempt to demonstrate bad faith, Respondent has claimed that it had no notice of the Petitioner's service of two amended third party subpoenas. However, this is belied by the notice sent to Respondent and filed with this court as an exhibit to the Affirmation of Stuart Sugarman in opposition to the Motion to Quash. Sugarman Aff., Ex. 2.

their rights pursuant to BCL § 624, New York common law and paragraph 5 of the Proprietary Lease, to examine Respondent's books of account.[8] Indeed, while Petitioner's actions are governed by his concern regarding his investment and potential malfeasance on the part of Respondent as stated above, should Respondent's books of account lead Petitioner to find evidence in aid of the Pre-existing Action, that would be a legitimate, good faith purpose for demanding access to a corporation's books and records. *Retirement Plan for Gen. Empls. Of the City of N. Miami Beach,* 120 A.D.3d at 1056.

Even without a good faith purpose or motive for access to Respondent's full books and records, which Petitioner has shown, Petitioner and his fellow shareholders have an independent right to inspect Respondent's books of account as detailed paragraph 5 of the Proprietary Lease. The shareholders' clear right to this information is not negated by the Pre-existing Action between Petitioner and Respondent and/or the status of any third-party subpoenas. Respondent's refusal to allow Petitioner the opportunity to exercise this right is a breach of the Proprietary Lease.

Even if Respondent has raised an issue of fact regarding Petitioner's good faith and purpose, which it has not, this does not necessitate a dismissal of Petitioner's proceeding, but rather demonstrates the need for a hearing on that issue. *Pomerance v. McGrath*, 2015 N.Y. Misc. LEXIS 4415 *12 (N.Y. Sup. Ct. Dec. 1, 2015) (citing *Matter of Goldstein v Acropolis Gardens Realty Corp.*, 116 A.D.3d 776, 777 (2d Dep't 2014); *Madison Liquidity Inv. 103 LLC v Carey*, 291 A.D.2d 362, 362 (1st Dep't 2002)). At such a hearing, Respondent would bear the

[8] Respondent's argument that this action is related to and somehow barred by the Pre-existing Action is belied by the fact that the letter to Petitioner denying access to corporate records was sent by the Respondent's corporate attorney, Mr. Herbert Cohen, not the litigation firm handing the Pre-existing Action. At the time when Respondent denied Petitioner's request, Respondent clearly viewed this issue as separate from the Pre-existing Action.

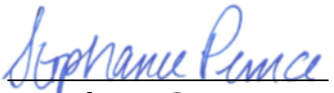
burden of demonstrating the shareholder's bad faith or improper purpose. *Id.* (citing *Matter of de Paula v Memory Gardens, Inc.*, 90 A.D.2d 886, 887 (3d Dep't 1982)). Petitioner has demonstrated a good faith purpose for seeking to inspect Respondent's books of account as well as preserve the rights of other shareholders of Respondent to do the same. As such, Respondent's motion to dismiss should be denied.

CONCLUSION

Based upon the foregoing, Petitioner respectfully requests that this Court deny Respondent's motion in its entirety, and grant any and all other relief this Court deems just and proper.

Dated: New York, New York
February 23, 2016

GUZOV, LLC

By: 

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