

NYSCEF D SUPREME COURT OF THE STATE OF NEW YORK 05/02/2017
NEW YORK COUNTY

PRESENT: HON. GERALD LEOVITS
J.S.C.
Justice

PART 7

Index Number : 158014/2016
MUSEY, J. ARMAND
vs.
425 EAST 86 APARTMENT CORP.
SEQUENCE NUMBER : 001
ART 78

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


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

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

*decided according to the attached decision/order
dated 4/27/17.*

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

Dated: 4/27/17


_____, J.S.C.

HON. GERALD LEOVITS
J.S.C.

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

**NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7**

J. ARMAND MUSEY,

Petitioner,

-against-

425 EAST 86 APARTMENTS CORP.,

Respondent.

Index No.: 158014/2016

DECISION/ORDER

Motion Seq. 1 and 3

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing the petition, respondent's motion to dismiss and petitioner's cross-motion to strike the answer.

Papers	Numbered
Notice of Petition and Verified Petition.....	1
Petitioner's Affidavit in Support of the Petition.....	2
Affirmation in Support of the Petition.....	3
Verified Answer.....	4
Reply Affidavit of Tracy Peterson in Further Opposition.....	5
Petitioner's Reply Affidavit in Support of Petition and in Support of Cross-Motion.....	6
Respondent's Notice of Motion.....	7
Respondent's Memorandum of Law in Support.....	8
Petitioner's Notice of Cross-Motion.....	9
Petitioner's Memorandum of Law in Support of Cross-Motion and in Opposition to Respondent's Motion.....	10
Respondent's Reply Memorandum of Law.....	11

Guzov, LLC, New York (Debra J. Guzov and Stephanie A. Prince of counsel), for petitioner.
Braverman Greenspun, P.C., New York (Tracy Peterson of counsel), for respondent.

Gerald Lebovits, J.

The court consolidates motion sequences 1 and 3 for disposition.

Petitioner, J. Armand Musey, is a shareholder of respondent, 425 East 86 Apartment Corporation, a New York cooperative corporation. Petitioner resides in the building located at 425 East 86th Street in New York County. Petitioner commenced this Article 78 proceeding to obtain documents from respondent. Petitioner seeks the following documents: (1) the income side of respondent's general ledger, a part of respondent's "full and correct books of account"; (2) electronic versions of these documents to the extent that respondent has maintained them in an electronic format; and (3) copies and/or the ability to scan/photograph respondent's documents. Petitioner seeks the documents under Business Corporation Law (BCL) § 624 and New York common law.

Respondent moves to dismiss the petition under CPLR 3211 (a) (7) and 7804 (f). Respondent argues that petitioner's request is improper and in bad faith.

Petitioner cross-moves under CPLR 3024 (b) and CPLR 4547 to strike respondent's answer and motion to dismiss.

I. The Petition and Respondent's Motion to Dismiss

The petition is granted. Respondent's motion to dismiss is denied.

In New York, "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 AD3d 1052, 1055 [1st Dept 2014].) If a corporation refuses to allow a shareholder to inspect its records and books, the shareholder may bring an Article 78 proceeding in the nature of mandamus. (*Matter of Crane Co. v Anaconda Co.*, 39 NY2d 14, 18 [1976].) In an Article 78 proceeding, a court may exercise its discretion "in light of equitable principles and [relief] will be granted 'with caution so as to prevent abuse.'" (*Id.* at 18-19 [citations omitted].) A court will not grant relief for "'speculative purposes, [or] the gratification of curiosity.'" (*Id.* at 19 [citations omitted].) A shareholder "must allege compliance with [a] statute. . . . [and] the bona fides of the shareholder will be assumed" by the court. (*Id.* at 20.) A corporation must "justify its refusal by showing an improper purpose or bad faith. The court may exercise its discretion and deny the petition where it was not made in good faith." (*Id.*)

Petitioner wants access to respondent's "full and correct books of account." Petitioner also wants the opportunity to copy the documents. Respondent has already given petitioner the expense side of its ledger, but it has refused to give petitioner the income side of its ledger. Respondent argues that petitioner seeks in bad faith to review the income side of its ledger. Respondent believes that petitioner brought this petition to have a bargaining chip against respondent in settling another, ongoing Supreme Court action.

Respondent agrees to let petitioner review its documents but with limitations. (Notice of Motion, Affidavit of David Munves in Opposition, at 15).

Respondent has given — and still offers — petitioner the opportunity to inspect the expense portion of the ledger at the building manager's offices. Petitioner had agreed to inspect the documents on respondent's terms and began inspecting the documents on May 25, 2016. On June 3, 2016, petitioner no longer wanted to inspect the documents: He stated in an email that "[i]n light of the progress we are making [in the negotiation process on an ongoing Supreme Court action], we will put additional document review on the back burner, but without conceding any rights." (Notice of Motion, Affidavit of Munves in Opposition to Petition, Exhibit B). In summer 2016, petitioner filed his petition in this case. Respondent alleges that petitioner filed this petition because their negotiations were at a standstill; petitioner asserts that he filed the petition before the statute of limitation under CPLR 217 expired and to comply with a tolling

agreement between the parties.¹ (Notice of Motion, Affidavit of David Munves in Opposition to Petition, at 45; Affirmation in Support of the Petition, at 4-5.)

Petitioner explains that he has concerns about respondent's mismanagement of funds. Petitioner is concerned about a transaction that respondent was involved with that ran approximately 90% over budget; petitioner is also concerned about tax and accounting issues. (Petitioner's Reply Affidavit in Support of Petition and in Support of Cross-Motion, at 6.) Whether respondent mismanaged funds is a valid purpose for reviewing respondent's documents. (*See Novikov v Oceana Holdings Corp.*, 46 Misc 3d 561, 569 [Sup Ct, Kings County 2014].)

Respondent has not demonstrated that petitioner's reasons for reviewing the documents are for an improper purpose or in bad faith. Respondent relies on *Matter of Salatino* (180 AD2d 434, 434 [1st Dept 1992]) to show petitioner's bad faith. The First Department in *Salatino* affirmed the lower court's decision to deny petitioner-shareholder's bad-faith request for documents. The *Salatino Court* noted that petitioner had

“brought duplicative law suits, one against the cooperative corporation, and the other against the individual board members, the latter asserting, inter alia, that such individuals harassed petitioner and seeking \$3 million for mental distress, and further, that he initiated two criminal complaints against the co-op president and the building superintendent, which the District Attorney saw fit not to prosecute; and verbally abused and harassed the co-op president and the building superintendent.” (*Id.*)

The cooperative had turned over to petitioner an audited version of the documents. (*Id.*)

Here, the parties have an ongoing action in Supreme Court, New York County, index # 157316/2014, and this is petitioner's second Article 78 proceeding.² But the parties' litigation history is not the same as it was in *Salatino*. Petitioner's Supreme Court action is intended to address issues about a terrace. Petitioner commenced that action against respondent, its property manager, and nine individual current and former members of respondent's board of directors to obtain an order requiring respondent to make a terrace adjoining petitioner's unit habitable, to make the roof habitable, to replace the exterior doors to the unit, and for compensatory and punitive damages against the cooperative corporation for claims of breach of fiduciary duty and fraud. After motion practice, all that remains of that lawsuit is the claim seeking an order that cooperative corporation is responsible to replace the doors outside the unit and a breach-of-contract claim based on that the allegation that the cooperative corporation failed to provide petitioner with quiet enjoyment of the terrace. The parties are attempting to settle that action.

¹ Under CPLR 217, when a shareholder's request for documents is denied by the corporation, the shareholder has four months to file an Article 78 petition. The parties refer to a tolling agreement that allowed the four-month limitation to be extended.

² This is petitioner's second Article 78 proceeding. In the first Article 78 proceeding, Index # 150368/2016, this court determined that the petition was premature because respondent had not rejected petitioner's request for unspecified documents.

Petitioner has a right to make copies of respondent's documents. Reviewing documents "would essentially be meaningless if the shareholder could not make copies to facilitate future recall of the examined records, and therefore the common-law right to inspect includes, as incident to the right to examine, the right to make paper copies during the inspection." (*Pomerance v McGrath*, 143 AD3d 443, 446 [1st Dept 2016].)

Respondent is concerned, however, that petitioner may post the documents on the Internet; petitioner has been keeping an up-to-date website regarding his legal disputes with respondent. Petitioner asserts that he is willing to sign a non-disclosure agreement to appease respondent's concerns. Respondent argues that a non-disclosure agreement is insufficient.

Respondent has not shown that petitioner posted information not publicly available. Respondent has its remedies if petitioner uses the documents for an invalid purpose.

The petition is granted, and respondent's motion to dismiss is denied. Respondent must give petitioner the income side of its ledger. Respondent must give petitioner copies of the ledger, allow petitioner to make copies, and give petitioner access to electronic copies, if electronic copies are available. Respondent must comply within 30 days.

II. Petitioner's Cross-Motion

Petitioner cross-moves to strike respondent's answer and the motion to dismiss. CPLR 3024 (b) provides that "[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading." Petitioner does not say what matter he deems scandalous, prejudicial, or even unnecessary in respondent's papers. In addition, CPLR 3024 (b) applies only to pleadings. The only pleading respondent has interposed is a verified answer. Respondent's answer contains only one-sentence responses in which respondent denies or admits the allegations contained in the petition. The court cannot tell what aspect of respondent's answer is scandalous or prejudicial.

CPLR 4547 provides that evidence of settlement negotiations is "inadmissible as proof of liability for or invalidity of the claim or the amount of damages." But when the settlement-related material is used for a purpose other than to prove a party's liability, CPLR 4547 is inapplicable. (*Am. Re-Ins. Co. v United States Fid. & Guar. Co.*, 19 AD3d 103, 104 [1st Dept 2005].) Respondent's answer and motion to dismiss rely on email communications about settlement negotiations with petitioner, relating to the underlying action to show that petitioner is acting in bad faith. Petitioner attempts to strike respondent's references to the negotiations in the answer and the motion to dismiss. Respondent is not using the settlement-related material to prove petitioner's liability in this court; CPLR 4547 is inapplicable.

Accordingly, it is

ORDERED that the petition is granted to the extent that respondent must provide to petitioner the income side of its ledger. Respondent must give petitioner copies of the ledger, allow petitioner to make copies, and give petitioner access to electronic copies, if electronic copies are available. Respondent must comply within 30 days of service with notice of entry; and it is further

ORDERED that respondent's motion to dismiss the petition is denied; and it is further

ORDERED that petitioner's cross-motion is denied; and it is further

ORDERED that petitioner serve a copy of this decision and order with notice of entry on respondent and on the County Clerk's Office, which is directed to enter judgment accordingly.

Dated: April 27, 2017



J.S.C.

HON. GERALD LBOVITS
J.S.C.