

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 7/24/08
ADJ. DATES 8/8/08
Mot. Seq. # 001 - MG; CDISP

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MATTHEW VERDONE, D.O.,	:	DEVITT, SPELLMAN, BARRETT, LLP
	:	Attys. For Petitioner
Petitioner,	:	50 Route 111
	:	Smithtown, NY 11787
For a Judgment pursuant to Article 78 of the Civil	:	
Practice Law and Rules,	:	WEISS & ZARETT, PC
	:	Attys. For Respondent
-against-	:	3333 New Hyde Park Rd.
	:	New Hyde Park, NY 11042
SUFFOLK ANESTHESIOLOGY	:	
ASSOCIATES, PC,	:	
	:	
Respondent.	:	
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Upon the following papers numbered 1 to 10 served and filed in this special proceeding commenced pursuant to CPLR Article 78 and BCL § 624; Notice of Petition/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 5-8; Replying Affidavits and supporting papers 9-10; Other _____; and after hearing counsel in support of and in opposition to the petition on August 8, 2008, said petition is decided as follows:

Petitioner commenced this special proceeding for a judgment directing the respondent to furnish the petitioner with a copy of a forensic accounting report prepared by accountants retained by the respondent's Board of Directors in 2008. The petitioner asserts a statutory and common law entitlement to the subject report, as he is a qualified shareholder of the respondent professional corporation (hereinafter "respondent PC").

The petitioner claims that the subject accounting report, the original of which was circulated and reviewed by the shareholders at a recent shareholders' meeting, details various improprieties engaged in by the former president of the respondent's Board of Directors and at least one other shareholder. Said improprieties include acts of misfeasance, fraud, waste and self-dealing, all of which are alleged to have detrimentally affected the financial well being of the respondent PC. Underlying such claims are allegations that corporate funds were wrongfully used to satisfy certain non-corporate obligations of certain individual shareholders that were incurred in connection with the purported purchase of a related corporation, which purchase all of the shareholders allegedly agreed to in April, 2007. The petitioner claims he is acting in good faith and in a manner consistent with the interests of the respondent PC since the well being of its corporate fabric may have been jeopardized by the improprieties and misconduct purportedly engaged in by the corporate officers and/or shareholders.

The respondent PC appeared herein by service of its answer and supporting papers wherein it opposes the petitioner's demand for relief. Said opposition is predicated upon the respondent's claims that: (1) the forensic accounting report that is the subject of the proceeding, does not constitute a corporate book or record within the contemplation of BCL § 624(d) or common law case authorities; and (2) the petitioner seeks the subject report in bad faith. The Court finds, however, that the respondent's position is unmeritorious and thus, it grants the petition subject to the confidentiality conditions set forth below.

New York law affords corporate shareholders desirous of inspecting and copying the books and records of their corporation two distinct, yet overlapping, remedies. The first evolved under common law case authorities while the other is a creature of statute (*see* BCL §§ 624; 1315). Neither remedy is absolute, however, as both are conditioned upon the petitioner's possession of bona fide intentions and each are subject to the discretion of the court (*see Matter of Crane v Anaconda Co.*, 39 NY2d 14, 382 NYS2d 707 [1976]).

The statutory remedy is less onerous insofar as the burden of proof is concerned since the bona fides of a shareholder, who satisfies the statutory criteria and pleads them in an enforcement proceeding, will be assumed (*see Matter of Crane v Anaconda Co.*, *ibid* at 39 NY2d 20). However, the corporate documents that are subject to inspection under statutes such as BCL § 624 by qualified shareholders are limited to those enumerated therein (*see Lewis v J&K Plumbing & Heating Co., Inc.*, 71 AD2d 708, 418 NYS2d 244 [2d Dept 1979]; *Carthage Paper Makers Inc. v Mutual Box Bd. Co.*, 2 AD2d 175, 153 NYS2d 759 [4th Dept 1956]; *see also Wells v League of Am. Theatres and Producers, Inc.*, 183 Misc2d 915, 706 NYS2d 599 [Sup Ct, NY County 2000]).

In contrast to the statutory remedy, the common law remedy affords a shareholder access to any corporate book or record that is necessary and relevant to the shareholder's stated purpose for the requested inspection (*see Dwyer v Dinardo & Metschl, PC*, 41 AD3d 477, 838 NYS2d 745 [4th Dept 2007]; *Matter of Troccoli v L&B Contr. Indus., Inc.*, 259 AD2d 754, 687 NYS2d 400 [2d Dept 1999]). However,

Appellate case authorities emanating from the Supreme Court, Second Department have held that a shareholder asserting a common law right of access must plead and prove that the inspection demanded is for a proper purpose (*see Matter of Marcato*, 102 AD2d 826, 476 NYS2d 582 [2d Dept 1984]; *see also Matter of Tatko v Tatko Bros. Slate Co.*, 173 AD2d 917, 569 NYS2d 783 [3d Dept 1991]).

Once a petitioning shareholder demonstrates, *prima facie*, his good faith and a facially valid purpose, the burden then shifts to the corporation to raise a substantial question of fact regarding the petitioner's good faith and motives (*see CPLR 7801 et seq.*; CPLR 409[b]). Where no such questions of fact are raised, the petitioner's demands for an inspection of the relevant corporate books and records may be granted without a hearing (*see Matter of Troccoli v L&B Contr. Indus., Inc.*, 259 AD2d 754, *supra*).

Case authorities have held that "proper purposes" include efforts to ascertain the financial condition of the corporation, the propriety of a dividend distribution, to calculate the value of stock, to investigate management's conduct and to obtain information in aid of legitimate litigation (*see Matter of Tatko v Tatko Bros. Slate Co., Inc.*, 173 AD2d 917, *supra*). Where information concerning management conduct and control of the corporation is necessary for the protection of a shareholder's stock interest, disclosure of relevant corporate books and records will be compelled (*see Matter of Taylor v Citizens' Nat'l Bank of Saratoga*, 117 AD 348, 101 NYS 1039 [3d Dept 1907]). Improper purposes have been held to include those which are inimical to the corporation, such as those aimed at discovering business secrets to aid a competitor of the corporation or to secure prospects for personal business (*see Matter of Crane v Anaconda Co.*, 39 NY2d 14, *supra*; *Matter of Tatko v Tatko Bros. Slate Co., Inc.*, 173 AD2d 917, *supra*).

Upon application of the foregoing legal maxims to the facts presented on the instant application, the Court finds that the petitioner has demonstrated, *prima facie*, his good faith and a proper and facially valid purpose for his demand for a judicial directive directing the respondent PC to make available to the petitioner the forensic accounting report that is the subject of this action. The opposing papers submitted by respondent PC were insufficient to raise any genuine questions of fact which would warrant a hearing on the issue of the petitioner's entitlement to the record demanded.

The respondent's claim that the subject forensic accounting report need not be disclosed since it is not among the books and records enumerated in the statute (*see BCL § 624*) is rejected as unmeritorious. The petitioner's common law right to the inspection demanded is not restricted to the books and records enumerated in BCL § 624. Equally without merit is the respondent PC's assertion that the petitioner's demands for disclosure have been posited in bad faith. The bald, conclusory and speculative assertions that the petitioner seeks the subject report in bad faith and/or for personal rather than corporate objectives are without support and are insufficient to rebut the petitioner's *prima facie* showing of his entitlement to disclosure of the subject report. These circumstances, coupled with the respondent's circulation of said report to its shareholders at a recent shareholders' meeting, clearly reveal the untenable nature of the respondent's opposition to the relief demanded by the petitioner.

In view of the foregoing, the petition is granted to the extent that the respondent PC is directed to make the subject forensic accounting report available for inspection and copying to the petitioner within ten (10) days after service of a copy of this Order and judgment upon the respondent PC's counsel by facsimile. The petitioner is, however, directed to refrain from publishing or otherwise disseminating copies of said report to persons other than the petitioner's legal counsel and financial advisors, all of whom are likewise restrained.

This constitutes the Order and Judgment of the Court.

DATED:

8/14/08



THOMAS F. WHELAN, J.S.C.