

Santiesteban v 94-102 Hamilton Place H.D.F.C.

2009 NY Slip Op 33058(U)

November 12, 2009

Supreme Court, New York County

Docket Number: 111736/09

Judge: Eileen A. Rakower

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

HON. EILEEN A. RAKOWER

PRESENT: _____

PART 5

Justice

SANTIESTEBAN

INDEX NO. 111 736/09

MOTION DATE _____

- v -
94-102 Hamilton Place

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1, 2

Answering Affidavits — Exhibits _____

3, 4

Replying Affidavits _____

5, 6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
NOV 18 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/12/09


HON. EILEEN A. RAKOWER c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
ROSEMARIE SANTIESTEBAN, on behalf of herself and
Shareholders 1-5 of 94-102 Hamilton Place,
Petitioner,
- against -
94-102 HAMILTON PLACE H.D.F.C., WILLIAM
CROWDER, and EQUILLA CROWDER,
Respondents.

Index No.111736/09
DECISION and ORDER

Mot. Seq. 001

FILED
NOV 18 2009
NEW YORK
COUNTY CLERK'S OFFICE

HON. EILEEN A. RAKOWER, J.S.C.

Petitioner Rosemarie SantiEsteban ("Petitioner") is a shareholder of 94-102 Hamilton Place Housing Development Fund Corporation ("Hamilton Place" or "the corporation"), and resides at 100 Hamilton Place, in the County and State of New York. Petitioner brings this petition seeking an order of this court (1) directing that the corporation make its records available for Petitioner's inspection pursuant to Business Corporation Law ("BCL") §624 and the corporate bylaws; (2) ordering additional pre-action disclosure pursuant to CPLR §3102(c); and (3) ordering Respondents William Crowder and Equilla Crowder ("Mr. and Mrs. Crowder") to reimburse the corporation for any expenses associated with the defense of the instant Petition.

Hamilton Place was established in 1985 under the Tenants Interim Leasing program, which allowed tenant groups to use their rent proceeds to repair and refurbish their buildings in order to bring them in compliance with building code requirements. After the tenants successfully renovated their building, the City would then transfer ownership to a co-op corporation, which was in turn mandated to sell its shares at reduced and restricted rates to tenants of the building.

Petitioner has been a shareholder in the corporation since 2007. Petitioner asserts that, since becoming a shareholder, she has become increasingly concerned about the Board of Directors' ("the Board") management of Hamilton Place. The five-person Board is currently comprised of Mr. and Mrs. Crowder (who are President and Vice President, respectively), Linda Crowder and Ruby James (Mr. and Mrs. Crowder's daughters), and Alfreda Barnes. Petitioner states that Barnes is "a shareholder who is an associate of [the Crowders], does not live in the building, and subleases her unit in violation of Hamilton Place's governing documents."

Petitioner alleges that the Board, dominated by Mr. and Mrs. Crowder, has mismanaged Hamilton Place and has engaged in a number of improprieties both to further solidify their power in the corporation, and to personally benefit the Crowders and their associates. Petitioner alleges that the Board has improperly transferred, sold and leased Hamilton Place units to family and friends who do not live in the building, but rather rent units out as an extra source of personal income. In addition, Petitioner claims that the Board members have personally enriched themselves by paying themselves salaries in contravention of the corporate bylaws; have hired themselves and their associates to perform maintenance and other services; and have engaged in self-interested transactions.

According to Petitioner, the Crowder-dominated Board has a long history of shareholder complaints against it. Petitioner alleges that these complaints range from the Board's failure to make necessary capital improvements to its arbitrary denials of lease renewals in rent stabilized leaseholds. Petitioner alleges that the legitimate concerns of Hamilton Place shareholders are typically met "with intimidating threats of eviction, fines, legal action and even physical violence."

Petitioner states that, in 2008, she and other shareholders managed to get the Board to conduct Board elections for the first time since 1986. This election resulted in the Board being constituted of Mr. and Mrs. Crowder, Linda Crowder, Alfreda Barnes, and Althea Aaron. Among the five, Aaron is the only individual who is not either a Crowder, or one of their "associates." Petitioner claims that, as an outsider, Aaron's attempts to introduce transparency into the Board's activities were consistently frustrated by the other Board members; and that they have convened Board meetings and conducted business in her absence.

Petitioner alleges that for years, Hamilton Place has failed to provide shareholders with its financial statements, audits, or annual reports, in contravention of corporate bylaws. Starting early this year, Petitioner made several informal attempts to access corporate records in order to determine whether Hamilton Place was being run in a fiscally responsible manner, and to identify current shareholders in order to change the composition of the Board. Petitioner states that the Crowders repeatedly denied her requests to examine corporate records, prompting her to seek the assistance of counsel.

On May 26, 2009, Petitioner sent a certified letter advising the Board that she intended to inspect the corporation's books and records pursuant to BCL §624 on June

1, 2009. Petitioner then appeared with counsel at 94 Hamilton Place, #6A, which is the corporate office for Hamilton Place (as well as the residence of Mr. and Mrs. Crowder). Mr. and Mrs. Crowder were both present, and Mr. Crowder acknowledged receipt of Petitioner's letter. However, Mr. Crowder stated that his refusal to respond to the notice meant that he was not obligated to provide access to corporate records. In addition, Mrs. Crowder told Petitioner that she would not allow Petitioner to access corporate records without a letter from the City.

On June 11, 2009, Petitioner received a letter from the Board signed "BOD" denying Petitioner's request, stating that it was the Board's belief that Petitioner's request was being made in bad faith and for improper purposes.

On July 7, 2009 counsel for Petitioner sent a letter to Mr. Crowder responding to the Board's June 11, 2009 letter, demanding that the corporation provide Petitioner access to corporation records from January 1, 2002 through the present, as well as a list of current shareholders. Counsel also cautioned Mr. Crowder that any denial of access to corporate records made in bad faith could render him personally liable for expenses incurred by the corporation, including litigation costs. Along with the letter, Petitioner's counsel enclosed a sworn affidavit from Petitioner, wherein Petitioner states that she is not seeking inspection for an improper purpose, and that she has not sold or offered for sale any list of corporate shareholders in the past five years.

On July 24, 2009, counsel for Hamilton Place sent a letter to Petitioner's counsel, wherein Hamilton Place's counsel stated that the Board "is willing to comply with [Petitioner's] shareholder rights and can have documents available for inspection...."

However, on August 5, 2009, counsel for the Board advised Petitioner's counsel that the Board would not provide Petitioner with access to corporate books and records because she had been late in paying a monthly maintenance fee. Petitioner states that she rectified this issue within 24 hours. In addition, the Board raised the issue of renovations made to the exterior of her apartment approximately a year and a half earlier.

Counsel for Petitioner responded by letter the next day, questioning the basis of the Board's most recent rejection of Petitioner's request to inspect the corporation's books and records, and noting the Board's shifting justifications for denying Petitioner access.

The Board, by counsel, responded by letter dated August 7, 2009 which stated that Petitioner would have to wait until at least September 10, 2009 to receive access to the corporate records. The Board also stated that Petitioner's request was overly broad, and that the Board would only allow Petitioner to inspect records going back to the year 2007.

Petitioner commenced this proceeding on August 17, 2009, arguing that the Crowder-dominated Board has consistently thwarted Petitioner from accessing Hamilton Place books and records, despite her entitlement to inspect these records under both BCL §624, and the corporate bylaws. Petitioner alleges that the Board's repeated denials were made in bad faith for the purpose of, among other things, preventing Petitioner and other shareholders from obtaining relevant information about the management of Hamilton Place prior to Board elections in September 2009. Petitioner submits a verified petition and a memorandum of law in support of the petition. Annexed to the Petition as exhibits are copies of the offering statement to convert Hamilton Place to a housing cooperative; the certificate of incorporation; the corporate bylaws; the proprietary lease for shareholders; the resale policy for Hamilton Place shares; 2003 and 2008 letters from shareholders seeking access to corporate books and records; a 2001 note posted by "Management" in response to a shareholder complaint about Mr. and Mrs. Crowder, wherein the complainant is labeled a "terrorist;" and the above-recounted letters between Petitioner and the Board regarding her request to inspect corporate books and records.

Hamilton Place submits an affirmation and memorandum of law in opposition. Hamilton Place states that, on September 9, 2009, it provided the following to Petitioner:

- 2005/2006 Balance Sheet;
- 2005/2006 Liabilities and Stockholder's Equity
- 2005/2006 Statement of Retained Earning;
- 2005/2006 Statement of Income;
- 2006 Cash Flow Statement;
- 2005/2006 Schedule of Expenses;
- 2007 Financials cover page
- 2007 Financials table of contents;
- August 25, 2008 CPA letter;
- 2007 Balance Sheet;
- 2007 Liabilities & Stockholders Equity;

- 2007 Retained Earnings;
- 2007 Statement of Income;
- 2007 Cash Flow Statement;
- May 25, 2008 CPA Statement;
- 2007 Schedule of Expenses;
- 2008 table of contents;
- April 29, 2009 CPA Letter;
- 2008 Balance Sheet;
- 2008 Liability & Stockholders Equity;
- 2008 Statement of Retained Earnings;
- 2008 Statement of Income;
- 2008 Cash Flow Statement;
- April 29, 2009 CPA Statement;
- 2008 Schedule of Expenses;
- 2006 US Tax Return
- 2007 US Tax Return;
- 2009 US Tax Return; and
- List of current shareholders and numbers of shares owned.

These documents are annexed to the affirmation in opposition as an exhibit.

Petitioner responds with a reply memorandum and an affidavit from Petitioner. Petitioner states that, contrary to providing the “complete financial records” of Hamilton Place, as Hamilton Place asserts in its opposition, it has only provided “four unaudited financial summaries, three tax returns, and a list of current shareholders.” Petitioner also states that the corporation only allowed Petitioner to inspect Board minutes from meetings held between March 24, 2008 and May 13, 2009 - a total of ten pages. In addition, Petitioner alleges that when she appeared at Hamilton place with counsel on September 10, 2009 to inspect the minutes, the Crowder’s placed them in circumstances designed to intimidate them. Specifically, Petitioner alleges that she and counsel were invited to a room in a vacant apartment where “more than a dozen family members and friends of the Crowders sitting in chairs ringing the room [were] glaring at [them].” Annexed to Petitioner’s affidavit as exhibits are copies of a 9/11/09 letter from Petitioner’s counsel to counsel for Hamilton Place recounting the circumstances of Petitioner’s inspection of the minutes and responding to Hamilton Place’s production of documents; proposed amended bylaws, which were provided to shareholders on September 15, 2009; a meeting notice distributed to shareholders on September 25, 2009; and a copy of an affidavit submitted by the Board in a quasi-

[* 7]
judicial proceeding.

“It is well settled that a shareholder has both statutory and common-law rights to inspect the books and records of a corporation if inspection is sought in good faith and for a valid purpose” (*Dwyer v. Di Nardo & Metschl, P.C.*, 41 A.D.3d 1177, 1178 [4th Dept. 2007]) (citing *Peterborough Corp. v. Karl Ehmer, Inc.*, 215 A.D.2d 663, 664 [2nd Dept. 2005]; BCL §624; *Crane Co. v. Anaconda Co.*, 39 N.Y.2d 14, 18-20 [1976]; *Tatko v. Tatko Bros. Slate Co.*, 173 A.D.2d 917 [3rd Dept. 1991]). In addition, Article IX, Section 6 of Hamilton Place’s bylaws provides that “[t]he books, records, documents and accounts of the Corporation, shall be open to inspection by shareholders, at reasonable times, at the office of the Corporation.”

Petitioner has met her burden by submitting an affidavit attesting to her good faith in seeking to inspect Hamilton Place’s books and records, and the investigation of the conduct of corporate management is a valid purpose for seeking inspection (see *Tatko* at 918). Hamilton Place has failed to raise a substantial question of fact as to Petitioner’s good faith and motives in response (see *Troccoli v. L&B Contract Indus.*, 259 A.D.2d 754, 755 [2nd Dept. 1999]).

During the pendency of this petition, Hamilton Place submitted the above-referenced documents, and permitted Petitioner to inspect Board meeting minutes. Petitioner contends that this production is insufficient, and that she is also entitled to inspect the general ledger, rent and maintenance rolls, and bank account statements. Petitioner states that these records are particularly necessary in light of Hamilton Place’s production of unaudited and unverified financial statements. Prefacing Hamilton Place’s financial statements for the years ended December 31, 2007 and 2006; and for the years ended December 31, 2008 and 2007 are letters from Hamilton Place’s CPA which state the following:

A compilation is limited to presenting in the form of financial statements information that is the representation of management. We have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or any other form of assurance on them.

Management has elected to omit substantially all of the disclosures required by generally accepted accounting principles. If the omitted disclosures and statement were

8] included the financial statements, they might influence the user's conclusions about the Company's financial position, results of operations, and cash flows. Accordingly, these financial statements are not designed for those who are not informed about such matters.

The scope of the right to inspect corporate books and records is broad, and is to be determined by the court in the exercise of reasonable discretion (*Tatko* at 919). Applying that discretion to the case at bar, the court finds that Hamilton Place shall make available for inspection the following records sought by Petitioner:

- Records sufficient to show all changes to the list of shareholders from January 1, 2005 through the present;
- Minutes of all shareholder, board, and executive meetings, including all board resolutions from January 1, 2005 through the present;
- Financial statements, audits and tax returns for Hamilton Place as required by the Hamilton Place from January 1, 2005 through the present;
- Records sufficient to show all contracts and disbursements for maintenance and capital improvements from January 1, 2007 through the present;
- Records sufficient to show the monthly shareholder/tenant maintenance or rent obligations to Hamilton Place, and records indicating payment of same from January 1, 2007 through the present;
- Records sufficient to show all transfer fees received by Hamilton Place from January 1, 2007 through the present; and
- All records concerning any payment or disbursement to any Hamilton Place Board member or shareholder from January 1, 2007 through the present.

Given the legitimate shareholder concern that the corporation be governed efficiently, in accordance with corporate bylaws, and free of waste and self-dealing on the part of the Board, Petitioner should be accorded an opportunity to determine the accuracy of Hamilton Place's financial statements and the propriety of the Board's dealings by inspecting the above-mentioned records (*see Tatko* at 918-19) (finding that the petitioner should be given the opportunity to inspect corporate records which would have bearing on the book value of stock he intended to sell where respondent's balance sheet and comparative statement of income and retained earnings came with accountant's caveat that the information was "the representation of management" and that respondent's financial statements were neither reviewed nor audited).

To the extent that Petitioner seeks additional discovery pursuant to CPLR §3102(c), the court finds that the above-directed disclosure should provide sufficient information for Petitioner to frame a complaint (*see Holzman v. Manhattan and Bronx Surface Transit Operating Auth.*, 271 A.D.2d 346, 347 [1st Dept. 2000]). Accordingly, this request is denied.

Finally, the Board's repeated blanket denials of Petitioner's requests to inspect records (more than a mere dispute as to the scope of the inspection), which cite different grounds on each occasion, give the appearance that bad faith was the driving force behind the Board's denials. Accordingly, this court is required to enjoin the expenditure of corporate funds in Respondents' defense, and instead Mr. and Mrs. Crowder shall personally reimburse the corporation for all costs and fees incurred by Hamilton Place in connection with its denial of Petitioner's request to inspect corporate books and records, including but not limited to the costs in defending the instant petition (*see Estate of Purnell v. LH Radiologist, P.C.*, 228 A.D.2d 360, 361 [1st Dept. 1996] *aff'd* 90 N.Y.2d 524 [1997]) (IAS court erred in declining to enjoin the expenditure of corporate funds in respondents' defense as record indicated that individual respondent "may have pursued his position in bad faith").

Wherefore, it is hereby

ORDERED and ADJUDGED that the Petition is granted to the extent that Respondents are to make the above-listed items available for Petitioner's inspection at a time and location mutually agreed upon by Petitioner and Respondents but no later than 30 days after receipt of a copy of this order with notice of entry; and it is further

ORDERED that Respondents Mr. and Mrs. Crowder shall reimburse Hamilton Place for all costs and fees incurred by Hamilton Place in connection with its denial of Petitioner's request to inspect corporate books and records.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: November 12, 2009


EILEEN A. RAKOWER, J.S.C.

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NOV 18 2009
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