

**Matter of Bono v Franny Lew Props.**

2013 NY Slip Op 31031(U)

May 9, 2013

Sup Ct, Queens County

Docket Number: 21335/2012

Judge: David Elliot

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Short Form Order/Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT  
Justice

IAS Part 14

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In the Matter of

Index  
No. 21335 2012

The Application of JOSEPH BONO, as a member  
of FRANNY LEW PROPERTIES, LLC.,  
Petitioner,

Motion  
Date December 20, 2012

For the inspection of the minutes of the proceedings  
of members, record of members, annual balance  
sheet, profit and loss statements, and related financial  
information for the immediately preceding three  
fiscal years, and for any interim balance sheet or  
profit and loss statements made available to the  
public of Franny Lew Properties LLC pursuant to  
Limited Liability Law §1102,

Motion  
Cal. No. 26

Motion  
Seq. No. 1

Conference  
Date May 8, 2013

-against-

FRANNY LEW PROPERTIES and DIMITRIOS  
MALAXIANIS,  
Respondents.

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The following papers numbered 1 to 15 read on this motion by petitioner for an order directing respondents to disclose information to petitioner pursuant to Limited Liability Company Law § 1102.

	<u>Papers Numbered</u>
Order to Show Cause - Affirmation - Exhibits.....	1-5
Answering Affirmation - Exhibits.....	6-9
Reply.....	10-13

Papers Submitted..... 14-15

Upon the foregoing papers it is ordered that the petition is determined as follows:

In this special proceeding, petitioner states that he is one of two members of respondent Franny Lew Properties, a limited liability company which was formed on February 14, 2000. Petitioner is a 40% member and respondent Dimitrios Malaxianis is a 60% member thereof. According to petitioner's affidavit, the LLC is a real estate holding and development company formed for the purpose of purchasing certain premises, consisting of six commercial rental units, of which petitioner contributed his share of the capital contribution used to purchase same (as did Malaxianis).

Petitioner avers that, over the years, tenants changed and new leases were entered into, and security deposits advanced were apparently never kept in an interest bearing account or separate from the LLC's funds despite his recommendation that they should be. Petitioner further states that, commencing in January 2008, Malaxianis began pushing him out of day-to-day affairs of the LLC, exercising complete control over the company, and refusing to make petitioner a signatory on the LLC's bank account. Since that time, petitioner states that he has received only limited information and disbursements from the company, and Malaxianis has "failed to account to me as to the profits and losses of the company, or the value of my 40% interest." As such, petitioner requested, by his attorney, by letter dated August 22, 2012, inter alia, the following: (1) member agreement; (2) certificate of incorporation; (3) by-laws and each amendment thereof; (4) operating agreement; (5) ledgers for the past three years; (6) bank/brokerage statements; and (7) leases issued. Same was requested in order to determine the financial status of the LLC as well as the value of his shares. Petitioner also submitted therewith an "Affidavit of Purpose of Inspection" which explained that the demand was "not desired for a purpose which is in the interest of a business or object other than the business of said Limited Liability Company." The instant proceeding was commenced subsequent to the denial by respondents of petitioner's request.

In response to the petition, respondents assert that they have already furnished annual financial statements, balance sheets, tax returns, minutes of member meetings, and some organizational documents of the company. Respondents assert that this application is no more than an attempt to harass Malaxianis because of the members' contentious history (indicating also that Malaxianis' improper naming as a respondent herein is further evidence of that harassment). Respondents further contend that petitioner's demand goes well beyond what he is entitled to under the law and the LLC's operating agreement. Finally, respondents argue that petition has no legitimate purpose for requesting these documents and that all the documents which were already provided fulfil his stated purpose, to wit: to assess the financial status of the LLC.

After submission of the application, the matter was set down for conference. Before said date, counsel for respondents moved to withdraw as attorney. That motion was granted by order dated February 25, 2013, and the conference was adjourned to April 19, 2013. On April 19, both sides appeared; however, respondents appeared without counsel. At that time, now self-represented Malaxianis was advised that he could not appear on behalf of the LLC (CPLR 321 [a]; *see Michael Reilly Design, Inc. v Houraney*, 40 AD3d 592 [2007]). As a result, the matter was again adjourned to provide the LLC (and Malaxianis, if he wished) time to appear by counsel.<sup>1</sup> On May 8, 2013, the parties appeared again, at which time the court was advised: (1) that the LLC had not retained counsel (thereby rendering the LLC in default of appearing for the court-ordered conference); (2) that, according to petitioner, Malaxianis' submission of documents did not fully comply with petitioner's demand; and (3) that the parties could not reach a resolution without court intervention.

As a preliminary matter, to the extent that respondents argue that Malaxianis is not a proper party to this proceeding, same is without merit (*see* CPLR 610). Turning to the substantive issue addressed in the application itself, LLC Law § 1102 provides:

“(a) Each domestic limited liability company shall maintain the following records, which may, but need not, be maintained in this state:

(1) if the limited liability company is managed by a manager or managers, a current list of the full name set forth in alphabetical order and last known mailing address of each such manager;

(2) a current list of the full name set forth in alphabetical order and last known mailing address of each member together with the contribution and the share of profits and losses of each member or information from which such share can be readily derived;

(3) a copy of the articles of organization and all amendments thereto or restatements thereof, together with executed copies of any powers of attorney pursuant to which any certificate or amendment has been executed;

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1. The matter was also adjourned for the purposes of allowing the parties to – amongst themselves – attempt to settle the matter, and also to allow counsel for petitioner to review voluminous documents given to him by Malaxianis which attempted to further comply with petitioner's demand for inspection. Those documents, according to Malaxianis, included: (1) three years of income tax returns, financial statements, stock statements, profit-loss statements, annual rent statements, current assets, fixed assets, liabilities, et cetera.

(4) a copy of the operating agreement, any amendments thereto and any amended and restated operating agreement; and

(5) a copy of the limited liability company's federal, state and local income tax or information returns and reports, if any, for the three most recent fiscal years.

(b) Any member may, subject to reasonable standards as may be set forth in, or pursuant to, the operating agreement, inspect and copy at his or her own expense, for any purpose reasonably related to the member's interest as a member, the records referred to in subdivision (a) of this section, any financial statements maintained by the limited liability company for the three most recent fiscal years and other information regarding the affairs of the limited liability company as is just and reasonable.

(c) If provided in the operating agreement, certain members or managers shall have the right to keep confidential from other members for such period of time as such certain members or the managers deem reasonable, any information which such certain members or the managers reasonably believe to be in the nature of trade secrets or other information the disclosure of which such certain members or the managers in good faith believe is not in the best interest of the limited liability company or its business or which the limited liability company is required by law or by agreement with a third party to keep confidential.

(d) A limited liability company may maintain its records in other than a written form if such form is capable of conversion into written form within a reasonable time."

In addition, the LLC's operating agreement provides as follows, in Article 3.4 thereof: "Information. Each Member may inspect during ordinary business hours and at the principal place of business of the Company the Articles of Organization, the Operating Agreement, the minutes of any meeting of the Members and any tax returns of the Company for the immediately preceding three Fiscal Years."<sup>2</sup>

First, to the extent that petitioner demand copies of documents which are unlimited in duration, same is denied as overly broad and without due justification, especially considering the fact that this is not a proceeding which alleges causes of action for

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2. It is noted that the Operating Agreement provided to the court does not contain the signature of petitioner Joseph Bono.

mismanagement or breach on the part of Malaxianis as a member of the LLC (*see e.g. Hay v 436 Realty, LLC*, 2007 WL 2691987 [Sup Ct, New York County 2007]). Petitioner is, however, entitled to inspect the LLC's books and records for, and all leases in effect during, the three most recent fiscal years since, under both the LLC Law and the operating agreement, petitioner is entitled to inspect same for the legitimate purpose of ascertaining the financial condition of the LLC. It is noted that there is no allegation that LLC Law § 1102 (c) is applicable herein, nor was there ever a motion for a protective order (*cf. Reichman v Reichman*, 88 AD3d 680 [2011]). Petitioner is also entitled to those documents initially requested, per this order, described *infra*.

Accordingly, it is hereby

ORDERED and ADJUDGED that petitioner's application is granted only to the extent that respondents shall make available for petitioner and/or his duly authorized representative's inspection and copying (at petitioner's expense), to the extent not already provided by respondents, all records maintained by the LLC pursuant to LLC Law § 1102 (a), and all financial statements maintained by the LLC for the three most recent fiscal years, and it is further

ORDERED and ADJUDGED that respondents shall also make available all those items requested in the August 22, 2012 correspondence, with the limited exception of items 6 and 7, which shall be limited only in duration to the three most recent fiscal years, and it is further

ORDERED and ADJUDGED that said inspection shall occur at a time and location mutually agreed upon by the parties later than 30 days after receipt of a copy of this order with notice of entry and it is further

ORDERED and ADJUDGED that all other relief requested is denied.

A copy of this order/judgment is being mailed to the parties on this date.

Dated: May 9, 2013

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J.S.C.