

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

In the Matter of the Application of BLEECKER
CHARLES CO.,

Petitioner,

Index No. 110835/02

I.A.S. Part 11

Hon. Joan A. Madden

For the Inspection of the Minutes of Meetings of
the Directors and Shareholders and Record of
Shareholders of 350 Bleecker Street Apartment
Corp.

-against-

350 BLEECKER STREET APARTMENT
CORP.,

Respondent.

**MEMORANDUM OF LAW OF PETITIONER
BLEECKER CHARLES CO. IN SUPPORT OF
APPLICATION FOR TURNOVER OF CORPORATE RECORDS**

Dated: June 12, 2002

Preliminary Statement

Petitioner Bleecker Charles Co., the holder of 23.5% of the shares of respondent 350 Bleecker Street Apartment Corp., filed this Petition to compel respondent to produce electronic copies of 1) the current list of shareholders; and 2) minutes of meetings of the Board of Directors and shareholders of respondent from September 22, 1999 to the present. With respect to the shareholder list and minutes of shareholders' meetings, there is no dispute that petitioner is statutorily entitled to receive this information and that petitioner has satisfied the statutory requisites. Respondent simply refuses to produce the shareholder list in electronic format and insists, vexatiously, that petitioner must hand copy the names and addresses from the list in the office of respondent's attorney. Respondent has offered no opposition to petitioner's request for shareholder minutes.

There is also no dispute that petitioner has a common law right to receive copies of the Board minutes, which may be denied only if respondent demonstrates that petitioner's request has been made in bad faith and for an improper purpose. The sole fact on which respondent bases its contention of bad faith is the fact that Bleecker Charles has recently prevailed in a declaratory judgment action against the co-op and has received judgment awarding attorney's fees and costs of suit. Respondent's appeal has been fully briefed. As set forth below, the mere existence of litigation between a shareholder requesting access to Board minutes and the respondent corporation is insufficient to demonstrate bad faith and does not warrant denial of the petition.

As set forth in detail in the accompanying Affidavit of Kenneth B. Newman, Bleecker Charles has legitimate reasons for each of its requests and is entitled to judgment ordering respondent to produce the requested materials.

Petitioner Is Statutorily Entitled to Shareholder List and Shareholder Minutes in Electronic Format

BCL § 624 affords a shareholder of record of a corporation (for at least six months prior to the demand) the right to “examine . . . its minutes of the proceedings of its shareholders and record of shareholders and to make extracts therefrom for any purpose reasonably related to such person's interest as a shareholder.” BCL § 624(b). The corporation may deny a shareholder's request pursuant to this statute if the shareholder refuses to provide an affidavit attesting that “the inspection is not desired for a purpose which is in the interest of a business or object other than the business of the corporation and that he has not within five years sold or offered for sale any list of shareholders of the corporation” BCL § 624(c).

There is no dispute that Bleecker Charles has been a shareholder of record of respondent for the requisite period of time, made a request pursuant to the statute, and furnished the statutory affidavit. (*See* Petition ¶¶ 4-6) (A copy of the statutory affidavit, sworn to on October 30, 2001, is annexed as Exhibit B to the Petition.)

Respondent insists that it has complied with the statute by offering Mr. Newman an opportunity to “review” the shareholder list in the office of its attorney and to

hand copy the names and addresses of the shareholders. This position is in direct defiance of the statutory language, which expressly provides that a shareholder is entitled to a copy of the shareholder list “in written form and *in any other format in which such information is maintained by the corporation.*” BCL 624(b) (emphasis added). Respondent does not deny that it maintains its shareholder list and minutes in electronic format, as alleged in the Petition (§ 7).¹ Accordingly, petitioner is entitled to an order directing respondent to deliver the shareholder list and shareholder minutes in electronic format.

As set forth in the Newman Aff., Bleecker Charles requires the current shareholder list in order to comply with its obligation, as sponsor of the cooperative conversion, to serve an amendment to the offering plan on all shareholders and residents of the building. *See* 13 NYCRR § 18.1(e)(4). Until the offering plan amendment is served, Bleecker Charles is prevented from selling vacant apartments in the building, which it is obligated to do. Respondent's bad faith gamesmanship in refusing to turn over the shareholder list has prejudiced Bleecker Charles' ability to sell vacant apartments and continues to cause monetary damage to Bleecker Charles.

¹ Bleecker Charles was not obligated to accept respondent's offer to mail the offering plan documents to the shareholders its behalf. The Court of Appeals has expressly held that it is not improper for a shareholder to wish to communicate directly with shareholders and need not accept the corporation's offer to mail documents. *See Matter of Crane Co. v. Anaconda Co.*, 39 N.Y.2d 14, 17, 23 (1976) (noting petitioner had refused corporation's offer to mail prospectus to shareholders, and holding petitioner's wish to pursue direct communications with shareholders not improper).

Respondent Has Not Met Its Burden of Demonstrating That Petitioner Seeks the Board Minutes for an Improper Purpose

As respondent acknowledges, a shareholder has a common law right to review Board minutes where the request is made in good faith and is sought for a proper purpose. *Matter of Crane*, 39 N.Y.2d at 18; *Matter of Bondi v. Business Educ. Forum, Inc.*, 52 A.D.2d 1046, 1047 (4th Dep't 1976). Respondent bears the burden of demonstrating that the records are requested for an improper purpose. *Matter of Lewis v. J&K Plumbing & Heating Co., Inc.*, 71 A.D.2d 708, 709 (3d Dep't 1979).

In opposition to this Petition, respondent has alleged that the request has been made in bad faith because Bleecker Charles and the corporation are involved in adversarial litigation. As a factual matter, the litigation is essentially over. Judgment has been entered in favor of Bleecker Charles, and the Court has granted its application for attorneys fees. Respondent's appeal is fully briefed and the record on appeal has been filed. Respondent's concern that petitioner seeks the unredacted minutes for purposes of obtaining a litigation advantage are entirely unwarranted.

In any event, the case law makes clear that the mere existence of an adversarial litigation between the requesting shareholder and the corporation does not demonstrate bad faith or an improper purpose. *See Matter of Lopez v. SCM Corp.*, 71 A.D.2d 976, 977 (1st Dept. 1979) (holding “[t]he mere fact [petitioner] and his companies are engaged in litigation with [corporation] does not demonstrate lack of good faith”); *see also Matter of Tatko v.*

Tatko Bros. Slate Co., 173 A.D.2d 917, 918 (3d Dep't 1991) (holding request designed to obtain information in aid of litigation is proper).

As set forth in the Newman Affidavit, Bleecker Charles' purpose for seeking these records is entirely proper. Bleecker Charles seeks to investigate and expose the Board's concealment of material events from the shareholders, including developments in the Garage Lease litigation, the circumstances under which individual members of the Board made a substantial, and highly irregular loan to the co-op despite its earlier disclosure that it would seek a bank loan, the failure to account for payment of a substantial adverse award of attorneys fees in the co-op's financial statements, and the failure to disclose the resignation of a Board member. In addition, the Board has misrepresented to the shareholders the nature of the Garage Lease litigation.²

Bleecker Charles has a legitimate interest in investigating management's conduct (*Matter of Tatko*, 173 A.D.2d at 918; *Matter of Lewis*, 71 A.D.2d at 709 (noting “petitioner is concededly a large stockholder who appears to have a proper and justifiable interest in making the inspections to determine the extent and seriousness of questionable corporate actions”), as well as communicating with other shareholders for the purpose of seeking to persuade them to oust existing management (*Matter of Murchison v. Alleghany Corp.*, 27 Misc. 2d 290, 291 (Sup. Ct. N.Y. Co. 1960). Indeed, even the existence of

² The factual bases underlying Bleecker Charles' request for this information are set forth in detail in the Newman Aff.

“substantial personal malice” between shareholder and corporation, petitioner’s “ill feelings and a desire to change respondent’s management and policies do not render petitioner’s motives improper.” *Matter of Mayer v. National Arts Club*, 192 A.D.2d 863, 865 (3d Dep’t 1993).

The authorities cited by respondent are not to the contrary. In *Matter of Salatino v. 210 East 15th Street Tenants Corp.*, 180 A.D.2d 434 (1st Dep’t 1992), the Court affirmed denial of the tenant shareholder’s petition for broad categories of financial and other records of the co-op, including “income tax records, canceled checks, bills, bank statements, vouchers, correspondence” where the shareholder had commenced harassment suits against the co-op and Board members seeking damages for mental distress, as well as criminal complaints against the Board President and building superintendent, which had been dismissed by the District Attorney. At most, this case stands for the proposition that patently frivolous litigation by a shareholder against the co-op can be evidence of bad faith sufficient to warrant denial of a request for corporate records. In contrast, *Bleecker Charles* *entirely prevailed* in its litigation against the co-op and received an award of its attorneys fees. There is no basis for any finding that *Bleecker Charles*’ legitimate litigation against the co-op indicates bad faith in any way.

Respondent’s other citation, *Haberman v. 257 Central Park West, Inc.*, Index No. 124590/01 (Sup. Ct. N.Y. Co.) (a copy of which is annexed to respondent’s memorandum of law), *grants judgment* directing respondent to produce minutes of

shareholder meetings and special meetings, the shareholder list and the co-op's books of account for 2001. This citation fully supports Bleecker Charles' petition herein.

As respondent apparently agrees (Mem. of Law at 4), in the event the Court should find that respondent has raised a substantial question concerning the purpose of petitioner's common law request for records, the Court must hold a hearing on the issue of bad faith. *See Matter of Niggli v. Richlin Machinery, Inc.*, 257 A.D.2d 623, 633 (2d Dep't 1999); *Matter of Curkendall v. United Fed'n of Correction Officers, Inc.*, 107 A.D.2d 935, 936 (3d Dep't 1985). However, where, as here, "the demand is facially valid, good faith is assumed, obviating the need for a hearing." *Matter of Lopez*, 71 A.D.2d at 976; *see also Matter of Troccoli v. L&B Contract Indus., Inc.*, 259 A.D.2d 754, 754 (2d Dep't 1999). Mere conclusory allegations that petitioner is motivated by bad faith, without factual detail, are insufficient to warrant a hearing. *Matter of Gardega v. Washington Street Marine Officers Corp.*, 168 A.D.2d 364, 365 (1st Dep't 1990); *Matter of Lewis*, 71 A.D.2d at 709.

Respondent's claim that sensitive information concerning the Garage Lease litigation should be redacted from the Board minutes is baseless. Petitioner seeks to determine whether the Board breached its fiduciary duty to the shareholders by electing to proceed with a futile and expensive litigation against the advice of counsel. The only way to determine whether the Board acted contrary to legal advice is to examine the complete and unredacted Board minutes.

Significantly, the Board does not contend that any of the sensitive information in the minutes is entitled to protection under the attorney-client or work product privileges. As a threshold matter, such privileges were waived by their inclusion in the Board minutes, as to which the Board has no legitimate expectation of confidentiality. Moreover, the co-op may not raise the attorney-client privilege to prevent disclosure to a shareholder to whom it owes a fiduciary duty. However, in the event the Court determines that any redaction is appropriate here, petitioner respectfully requests an *in camera* review of all redacted material.

Petitioner Is Entitled to Recover its Costs of Commencing This Proceeding

Respondent, not petitioner, has proceeded in bad faith and without support in fact or law. Respondent has conceded that petitioner has a statutory and common law entitlement to most of the requested records. Respondent could have rendered this entire proceeding moot by simply turning over the records. Having requested an additional week to respond to the Petition, respondent made no attempt to resolve this matter. Instead, respondent elected to oppose the Petition in its entirety, which necessitated this substantial reply memorandum and affidavit. Under the circumstances, petitioner should be awarded its reasonable costs of commencing this proceeding. As respondent acknowledges, Part 130 provides the statutory basis for this relief.

Respondent's request for an award of its own costs of opposing this petition is utterly baseless. It was respondent's bad faith gamesmanship in refusing to provide an

electronic version of the requested records, combined with its taunting invitation to seek legal redress if petitioner were dissatisfied with the proffered opportunity to hand copy the shareholder list, that gave rise to this Petition. Under the circumstances, this Court may direct that respondent may not use corporate funds to pay the cost of opposing this Petition. *See Matter of Estate of Purnell*, 90 N.Y.2d 524, 532 (1997).

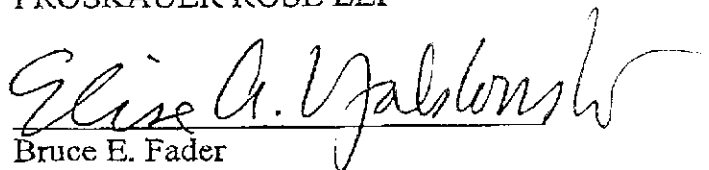
CONCLUSION

For the foregoing reasons, the Court should enter judgment directing respondent to produce, in written and electronic format, the complete and unredacted minute books of meetings of the Board of Directors and meetings of the shareholders of 350 Bleecker Street Apartment Corp. from September 22, 1999 to the present, and the current record of shareholders, including beneficial owners, of 350 Bleecker Street Apartment Corp., and award petitioner its lawful costs and disbursements, including attorneys fees, incurred in connection with this proceeding.

Dated: June 12, 2002

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