

SCANNED ON 1/25/2007

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARYLIN G. DIAMOND **PART 48**
Justice

Matter of JOHN S. HAY and the JOHN S. HAY FAMILY
TRUST DATED APRIL 13, 1992,

Petitioners,

-against-

436 REALTY, LLC et al.,

Respondents.

INDEX NO. 602587/06

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that: In this article 78 proceeding, petitioners John S. Hay ("John Hay") and the John S. Hay Family Trust (the "Trust") seek an order compelling respondents 436 Realty LLC ("436"), 144 Spring Realty LLC ("144 Spring"), Wooster Realty LLC ("Wooster"), and 376 West Broadway Enterprises, Inc. ("376 West Broadway") to produce certain documents relating to their operations. Petitioner John Hay is a California resident who, along with his two brothers, Henry Hay and Anthony Hay, has invested in various real estate properties located in New York. The respondents are four of the entities that the Hay brothers formed for the purpose of investing in these properties. The Trust owns a one-third interest in all four companies. John Hay is both a director and officer of 376 West Broadway. All of the respondents are managed by Henry Hay.

Petitioners allege that they are entitled to the production of various documents at issue herein pursuant to section 1102 of the Limited Liability Company Law and section 624(b) of the Business Corporations Law. The documents demanded include (1) operating statements for 144 Spring, Wooster and 376 West Broadway, (2) communications from January 1, 2001 to date concerning attempts to lease the properties owned by respondents, (3) copies of promissory notes and loan documents with respect to loans secured by interests in one or more of respondents' properties, as well as copies of appraisals performed on these properties, (4) copies of various invoices, cancelled checks, purchase orders and other documents showing expenses and management fees incurred by the properties and (5) copies of past minutes, resolutions, articles of incorporation, shareholder or voting agreements, by-laws and other corporate documents. Petitioners claim that these documents are needed in order for them to investigate the possibility that Henry Hay has mismanaged the properties.

Prior to commencing this proceeding, petitioners had requested that respondents turn over the requested documents for inspection by John Hay and his legal counsel. Respondents objected to the request on the ground that it was burdensome and harassing and that petitioners were not entitled to inspect all of the documents sought. Nevertheless, it appears that respondents, after turning over some of the requested materials, agreed to produce all of the remaining documents for all four entities by making them available to petitioners for copying and inspection at a location in Manhattan. However, respondents advised petitioners that this production was conditioned upon payment by John Hay of charges for the time and expenses incurred by respondents' management company and accounting firm, as well as all costs incurred by respondents in connection with the copying of the documents. Petitioners rejected this offer and commenced this special proceeding. In opposition to the petition, respondents again state that they are willing to produce the documents subject to the above conditions but in the event petitioners refuse to enter into such an agreement, they urge this court to reject the petition. In their reply papers, petitioners reiterate that the proposed conditions are unacceptable.

FILED
JAN 21 2007
COURT CLERK'S OFFICE
NEW YORK COUNTY

Discussion

Section 1102(a) of the Limited Liability Company Law requires that an LLC maintain certain records including, *inter alia*, a list of managers, the names and addresses of each member, copies of the articles of organization and operating agreements, as well as copies of the company's federal, state and local income tax returns and reports for the last three fiscal years. Section 1102(b) provides that any member of an LLC may inspect or copy "at his or her own expense" any of the records referred to in subdivision (a), as well as any financial statements maintained by the LLC for the three most recent years. The statute also allows a member to inspect "other information regarding the affairs of the limited liability company as is just and reasonable." Here, petitioners suggest that the phrase "just and reasonable" should be broadly interpreted so as to allow them the right to inspect records which go well beyond the scope of the type of documents detailed in the Limited Liability Company Law. The court declines to do so. Petitioners have not offered any justification for their request to inspect documents such as leases, invoices and checks other than a vague interest in investigating the possibility that Henry Hay has defrauded or mismanaged the companies. Indeed, petitioners have offered no proof of any wrongdoing by Henry Hay and have not explained why the information they seek would not be available in a lawsuit and/or in an arbitration proceeding which is already pending and apparently involves at least some of the same parties. Petitioners also have not adequately explained the basis for their rejection of respondents' offer to produce the documents at petitioners' expense given that the statute itself provides that it is the requesting member who must bear the expense of any such inspection. Under the circumstances, petitioners' inspection of records maintained by the three LLC respondents should be limited to the five categories of documents specifically mentioned in section 1102(a) of the Limited Liability Company Law and the inspection must be at their expense.

As to the Business Corporations Law, sections 624(a) and (b) allow a shareholder of a corporation to examine certain corporate records. However, petitioners' demands for documents from 376 West Broadway go well beyond the scope of the statute and petitioners have failed to cite to any other statutory authority allowing them to inspect such a broad range of documents. Nevertheless, it is well settled that a director of a corporation such as petitioner John Hay has an absolute and unqualified common law right to inspect the company's books and records. *See Lau v. DSI Enterprises*, 102 AD2d 794 (1st Dept. 1984). Thus, all of 376 West Broadway's books and records must be made available to petitioner John Hay. In view of the burden that such production imposes on the corporation and the fact that this matter should have been resolved by the parties without resorting to the courts, 376 West Broadway may charge John Hay for copying costs and all reasonable expenses incurred in preparing the documents for inspection.

Accordingly, the petition is granted to the extent that respondents 436 Realty LLC, 144 Spring Realty LLC and Wooster Realty LLC are hereby directed to produce for inspection, at petitioners' expense, a list of their managers, the names and addresses of each of their members, copies of their articles of organization and operating agreements and copies of each company's federal, state and local income tax returns and reports for the last three fiscal years, as well as any financial statements issued in the last three fiscal years. In addition, respondent 376 West Broadway is hereby directed to produce for inspection by petitioner John Hay all of its corporate books and records. The company may charge petitioner for copying costs and all reasonable expenses incurred in preparing the documents for such inspection. The petition is otherwise denied.

The Clerk Shall Enter Judgment Herein

Dated: 1/16/07

Check one: FINAL DISPOSITION

MGR

MARYLIN G. DIAMOND

NON-FINAL DISPOSITION

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JAN 19 2007
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