

STATE OF NEW YORK
SUPREME COURT
COMMERCIAL DIVISION

COUNTY OF ALBANY

MARK A. GALASSO as the Personal
Representative of THE ESTATE OF
MARTIN A. GALASSO, deceased,

Petitioner,

DECISION & ORDER

-against-

COBLESKILL STONE PRODUCTS, INC.,

Respondent.

Index No.: 908716-21

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

HINCKLEY, ALLEN & SYNDER LLP

Attorneys for Petitioner

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Hon. Richard M. Platkin, A.J.S.C.

This is a special proceeding brought by petitioner Mark A. Galasso, as the personal representative of the Estate of Martin A. Galasso, against respondent Cobleskill Stone Products, Inc. (“CSP” or “Corporation”). Petitioner, suing as a minority shareholder, seeks an order and judgment compelling CSP to allow the inspection of its financial statements and income tax returns for fiscal years 2019 through 2021.

In lieu of answering, CSP moves to dismiss the verified petition (*see* NYSCEF Doc No. 1 [“Petition”]). Petitioner opposes the motion.

BACKGROUND

CSP is a New York corporation that operates aggregate mines and asphalt plants and provides construction and trucking services. Petitioner is the personal representative of Martin A. Galasso, who owned 38.78% of CSP’s outstanding shares at the time of his passing on January 1, 2014 (*see* Petition, ¶ 6).

Two other cases involving the same parties are pending in this Court. Petitioner first commenced a shareholders’ derivative action on behalf of CSP on December 9, 2015, alleging excessive compensation, self-dealing and waste (*see Galasso v Cobleskill Stone Prods., Inc.*, Albany County Index No. 5763-15 [“Derivative Action”]; *see also Galasso v Cobleskill Stone Prods., Inc.*, 169 AD3d 1344, 1345 [3d Dept 2019]). Then, on January 25, 2019, petitioner sued for the judicial dissolution of CSP under Business Corporation Law (“BCL”) §§ 1104 (c) and 1104-a (*see Matter of Galasso v Cobleskill Stone Prods., Inc.*, Albany County Index No. 900486-19 [“Dissolution Proceeding”]).

On March 28, 2019, CSP made a binding election in the Dissolution Proceeding to purchase petitioner's shares (*see id.*, NYSCEF Doc No. 75; *see generally* BCL § 1118).¹ The parties have not yet agreed on the fair value of petitioner's shares, and expert discovery concerning the valuation of CSP is in its final stages.

On August 11, 2021, petitioner served upon CSP a written demand for inspection of the Corporation's "CPA-prepared financial statements and income tax returns for the fiscal years ended June 30, 2019; June 30, 2020; and June 30, 2021" (Petition, ¶ 12, quoting NYSCEF Doc No. 3 ["Demand"]).

CSP objected to the Demand on August 26, 2021, taking the position that petitioner is not entitled to financial records postdating the January 24, 2019 valuation date in the Dissolution Proceeding ("Valuation Date") (*see* NYSCEF Doc No. 5; *see also* BCL § 1118 [b] ["the fair value of the petitioner's shares as of the day prior to the date on which (the dissolution) petition was filed"]).

CSP now moves under CPLR 404 and 7804 (f) for an order dismissing the Petition on the ground that petitioner lacks a proper purpose for inspecting the Corporations' records and that he is acting in bad faith.

DISCUSSION

A. Financial Statements

Under BCL § 624 (e), a business corporation shall, "[u]pon the written request of any shareholder, . . . give or mail to such shareholder an annual balance sheet and profit and loss statement for the preceding fiscal year."

¹ Following CSP's election, the parties agreed to stay prosecution of the Derivative Action.

As petitioner observes, there is nothing in the text of BCL § 624 (e) that expressly requires the shareholder to demonstrate that he or she is acting in good faith and for a proper purpose. This is in contrast to BCL § 624 (b), governing access to the minutes of shareholder meetings and the shareholder list, which does require such a showing (*see Retirement Plan for Gen. Empls. of the City of N. Miami Beach v McGraw-Hill Cos., Inc.*, 120 AD3d 1052, 1055 [1st Dept 2014] [statutory right of inspection requires that the inspection be sought “in good faith and for a valid purpose”]).

For this reason, it has been held that “[t]he limitation imposed on the right of inspection set forth in subdivision (b) of section 624 does not apply to subdivision (e) of section 624” (*Matter of Apple v Careerco, Inc.*, 82 Misc 2d 468, 469 [Sup Ct, Onondaga County 1974]). And while the *Apple* decision itself is not binding precedent, as it is from a court of coordinate jurisdiction, the Appellate Division, Third Department embraced *Apple* in ruling that any question of shareholder “bad faith was not relevant or material . . . and [the shareholder] was entitled to [financial] statements once the statutory procedural requirements were met” (*Matter of Lewis v J & K Plumbing & Heating Co.*, 71 AD2d 708, 708-709 [3d Dept 1979], *lv denied* 48 NY2d 610 [1979]).

Accordingly, under the Third Department’s binding precedent in *Lewis*, CSP’s challenge to the relevance of the financial statements requested by petitioner and petitioner’s alleged bad faith in making the request have no bearing on petitioner’s right under BCL § 624 (e) to obtain the Corporation’s financial statements for the fiscal year preceding his Demand. CSP therefore has failed to demonstrate a legal basis for dismissing the branch of the Petition seeking access to the Corporation’s financial statements

B. Tax Returns

Petitioner acknowledges that he has no statutory right to review CSP's tax returns and, instead, invokes a common-law right to inspect CSP's books and records.

The common-law right of inspection "is qualified and can only be asserted where the shareholder is acting in good faith and has established that inspection is for a proper purpose" (*Matter of Crane Co. v Anaconda Co.*, 39 NY2d 14, 18 [1976] [internal quotation marks and citations omitted]; see *Matter of Tatko v Tatko Bros. Slate Co.*, 173 AD2d 917, 917 [3d Dept 1991]). "The general rule is that a stockholder has a right to examine the original papers and vouchers of the corporation, where some property right is involved, or some controversy exists, or some specific and valuable interest is in question, to settle which an inspection of these documents is necessary" (*Crane*, 39 NY2d at 18, quoting 2 Cook, *Corporations* [8th ed], ch 30, § 511 pp. 1764-1765). On the other hand, inspection "will not be granted for speculative purposes or the gratification of curiosity" (*id.* at 18-19 [internal quotation marks, brackets and citation omitted]; see *JAS Family Trust v Oceana Holding Corp.*, 109 AD3d 639, 643 [2d Dept 2013]).

"When asserting a common-law right of access the petitioner must plead and prove that inspection is desired for a 'proper purpose'" (*Crane*, 39 NY2d at 18 [internal citation omitted]; see *Matter of Marcato*, 102 AD2d 826, 826 [2d Dept 1984]). Further, the common-law remedy "lies in the discretion of the court in light of equitable principles" (*Crane*, 39 NY2d at 180).

Initially, the verified Petition is devoid of any articulated purpose for the inspection of CSP's tax returns (and the other requested financial material). Rather, the Petition merely alleges that "production of the tax returns is appropriate . . . because Petitioner submitted an affidavit of no improper purpose" (Petition, ¶ 18).

Likewise, the affidavit from petitioner that accompanies the Petition merely attests that the inspection of CSP's books and records "is not for a purpose which is in the interest of a business or object other than the business of the Corporation" (NYSCEF Doc No. 6, ¶ 2). But petitioner cannot meet his burden of pleading and proving a proper purpose by attesting to his lack of an improper purpose (*see JAS Family Trust*, 109 AD3d at 642-643).

Petitioner submits a second affidavit in opposition to CSP's dismissal motion, in which he avers that CSP "has always produced corporate tax returns and financial statements" and that petitioner has never used them for an improper purpose (*see* NYSCEF Doc No. 20, ¶¶ 4-5). Again, however, petitioner fails to affirmatively plead or prove a proper purpose for inspecting CSP's tax returns.

Finally, the memorandum of law submitted by petitioner's counsel in opposition to the motion states that the "use of the tax returns in the [Dissolution] Proceeding would constitute a proper purpose" (NYSCEF Doc No. 22, p. 5). In this regard, petitioner argues that the requested material "contains information prior to the [January 24, 2019] valuation date" and will serve to "confirm what a hypothetical buyer may have forecasted as of the Valuation Date" (*id.*, pp. 5-6). Petitioner further argues that the tax returns are "relevant to Petitioner's purpose of ensuring the Estate's stock is protected" (*id.*, p. 6).

The Court finds that petitioner's alleged desire to use the tax returns in the Valuation Proceeding is not a proper purpose,² and, even if it were, the Court declines, in the exercise of discretion, to grant the common-law remedy of inspection under the circumstances of this case.

Petitioner has had a full and fair opportunity in the Dissolution Proceeding to obtain all relevant information bearing on the value of the Estate's shares in CSP. Fact discovery was

² This purpose is not pleaded in the Petition and is unsupported by admissible evidence.

completed about 18 months ago, expert reports and rebuttal reports were exchanged earlier this year, and numerous expert depositions have been conducted. The only disclosure remaining in the Dissolution Proceeding are the depositions of the parties' two "lead" experts, which were delayed due to a medical issue concerning one of the experts.

The common-law right of inspection cannot be used to circumvent limitations on the scope or timing of disclosure in pending litigation (*see Barouh v Barouh*, 2009 NY Slip Op 30962[U], 2009 NY Misc LEXIS 4707, *22 [Sup Ct, Nassau County 2009] ["Nor is the right of shareholder inspection to be employed as a substitute for – or as a means of accelerating or circumventing – the normally applicable pre-trial disclosure devices"]; *Lipman v National Med. Waste, Inc.*, 1992 WL 97218, *1, 1992 Del Ch LEXIS 105, *3 [Del Ch 1992] [inspection right "is not a substitute for discovery"]; *see also CHC Invs., LLC v FirstSun Capital Bancorp*, 2019 WL 328414, * 2 n 40, 2019 Del Ch LEXIS 32, *6 n 40 [Del Ch 2019] [collecting Delaware authorities]; 2 Delaware Corporation Law and Practice § 27.04 [2020] [noting the hesitancy of the Delaware courts to allow inspection "where the purpose is the use of documents in other pending litigation . . . on the theory that discovery in such proceedings is the more appropriate way of obtaining relevant documents."]).

The Court therefore concludes that petitioner has neither pleaded nor proven that he has a proper purpose for accessing CSP's tax returns. Accordingly, CSP's motion to dismiss is granted to the extent that petitioner's Demand is predicated upon the common-law right of access to corporate books and records.

CONCLUSION

Based on the foregoing, it is

ORDERED that CSP's motion to dismiss is denied to the extent that the Petition seeks access to the Corporation's financial statements for the fiscal year preceding the Demand under BCL § 624 (e); and it is further

ORDERED that the motion to dismiss is granted to the extent that the Petition seeks inspection of CSP's books and records under the common-law right of inspection; and finally it is

ORDERED that respondent shall serve an answer to the Petition by **January 7, 2022**; petitioner may reply to the answer by **January 14, 2022**; and the matter shall be deemed re-noticed for hearing on **January 18, 2022**.

This constitutes the Decision & Order of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the Albany County Clerk. Upon such entry, counsel for respondent shall promptly serve notice of entry on all other parties entitled thereto.

Dated: Albany, New York
December 14, 2021


RICHARD M. PLATKIN
A.J.S.C.

Papers Considered:

NYSCEF Doc Nos. 1-7, 10, 12-22.³



12/14/2021

³ The Court takes judicial notice of the papers and proceedings in the Derivative Action and Dissolution Proceeding (*see Sam & Mary Hous. Corp. v Jo/Sal Mkt. Corp.*, 100 AD2d 901, 903 [2d Dept 1984], *aff'd* 64 NY2d 1107 [1985]).