SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of
KEVIN O'DONNELL,

DECISION & ORDER
INDEX NO. 63807/2018

Petitioner,

-against-

FLEETWOOD PARK CORP.,

Respondent.

For a Judgment Pursuant to Article 78 of the N.Y. Civil Practice Law and Rules

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FUFIDIO, J.

This is a proceeding commenced by the Petitioner, KEVIN O'DONNELL, pursuant to CPLR Article 78, asking that the Court direct the Respondent to permit him to inspect books and records, specifically, that he be provided the "Respondent's general ledger from fiscal year 2015/2016 to the present...Electronic versions of documents provided to the Petitioner where Defendant (sic) has maintained them in this format...Copies and/or the ability to scan/photograph documents, A full, complete, up-to-date, and unredacted shareholder list...." The Court has considered e-filed documents numbered 1-30 in consideration of this Decision and Order. Upon the foregoing papers, for the reasons articulated hereinafter the Petitioner's claim is granted as to the updated and un-redacted shareholder name and address list and denied as to everything else.

Factual and Procedural Background

The Respondent, Fleetwood Park Corporation (Fleetwood) is cooperative corporation which owns the apartment buildings at 754-800 Bronx River Road in Yonkers, New York. According to the New York State Department of State (NYSDOS), Fleetwood Park Corp's. Principal Executive Office is care of Benchmark LM Management Services, LLC (Benchmark), 951 E. Boston Post Road, Mamaroneck, New York 10543. The property is managed by Benchmark which is also the entity that is listed with the NYSDOS as the organization to which process will be sent if the NYSDOS is served with papers initiating judicial proceedings against Fleetwood Park Corp. The Petitioner, Kevin O'Donnell is a shareholder of Fleetwood and became a lease holding resident when he bought the shares for apartment A67 at 770 Bronx River Road, Yonkers, New York in July 2015. On October 13, 2017, the Petitioner made a written request to Benchmark asking to see the financial books for 2015 and 2016, stating that he wanted to see Fleetwood's income and expenses for that time period. He was told by Benchmark on October 18, 2017 that he would be permitted to view these records at the Benchmark offices,

but not be allowed to remove the physical records nor would he be able to make copies of the records. The Petitioner attempted again, on October 23, 2017, to view some more of Fleetwood's financial records, specifically, "any and all documents provided to Respondent's accountant who prepared the financial statements for 2015, 2016...2017." Petitioner was told by Benchmark that he was not permitted to view the "monthly financials." On April 23, 2018 the Petitioner clarified for Benchmark which specific documents he wanted to review as follows; "invoices for the past 12 months, the monthly financial reports for the past 36 months, the financial records documenting the amount paid for all painting done at the Respondent's buildings for the past 3 years, financial records regarding parking charges for the past three years, and a breakdown of the payments made under the 'sundry' heading of the summaries for the past three years." The Petitioner was finally granted access to the records, but would only be able to view them at Benchmark's offices and he would not be able to make copies or photograph them. The Petitioner claims, without offering any proof, that the documents were too voluminous and complex for him to understand them without being able to remove them from Benchmark's office. The Petitioner also alleges that his access would be monitored and under a time constraint and implies that he would not be allowed to bring anyone with him to view them.

Similar to the financial documents, in September, 2017, the Petitioner sought a copy of the list of Fleetwood shareholders in order to campaign for a position on the corporation's Board of Directors. He was told that he could view the list of approximately 478 units at Benchmark's office, but the only copy he would be allowed to have is a handwritten one that he would be required to make himself. Nevertheless, he did view the list pursuant to Benchmark's restrictions and did learn that the list was incomplete and out of date. In addition, he was not provided all of the shareholder's names and addresses because, he was told, some of the shareholders wanted their information to remain private. He was told that under no circumstances would he be able to view an un-redacted copy of the master shareholders list. The Petitioner has moved for an order directing Fleetwood, through it's managing agent Benchmark, to provide him with the information he has requested.

On September 6, 2018 the Petitioner served process upon Stephen Melowsky at the Benchmark office. Mr. Melowsky is a property manager at Benchmark, however, he does not manage Fleetwood and according to him has, "nothing to do with Fleetwood."
The Respondent has moved to dismiss the Petition and has filed their Answer to the Petition as well.

Legal Analysis

Addressing first the Respondent's motion to dismiss. The Respondent claims that the Court lacks personal jurisdiction over the Respondent because they were not properly served; alleging that, "Stephen Melowsky, a property manager (but not for Fleetwood Park) was...handed the Notice of Petition and Petition. He was not authorized to accept service on behalf of Fleetwood Park Corp." The other ground for Respondent's motion to dismiss is that service was untimely because they were served fewer than 20 days before the return date on the Petition. Neither of these arguments are persuasive.

First, as to whether or not a proper person was served, the Court finds that the Petitioner serving a property manager at Benchmark was proper, even if that person, Stephen Melowsky, was not a property manager for Fleetwood and has, "nothing to do with Fleetwood."

The purpose of CPLR 311 is to give a corporation notice of the commencement of an action (*Fashion Page, Ltd. v Zurich Ins. Co.*, 50 NY2d 265 [1980]). This was certainly achieved by the Petitioner. In fact, the Respondent complains that the date which they received notice, September 6, 2018, was too short in relation to the return date of the Petition, which will be addressed below. Nevertheless, the Respondent's own information on the NYSDOS website, lists, simply Fleetwood, care of Benchmark at 951 East Boston Post Road, Mamaroneck, New York 10543 as Fleetwood's principal executive office and the address which is listed for Department of State service is also Benchmark at 951 East Boston Post Road, Mamaroneck, New York 10543. There is no person listed in particular to whom that service would be sent. The Chief Executive Officer is Raymond Ortiz at 760 Bronx River, A14, Yonkers New York 10708 and notably there is no registered agent listed.

Given that there is relatively no guidance on whom to serve process listed in the information that Fleetwood has chosen to make available on the statewide database of business information, the Petitioner can hardly be faulted for showing up at what is listed as Fleetwood's principal executive office and where the NYSDOS says that they will send process and finding someone inside the office listed at that address to hand the papers initiating this action. While a process server may always serve one of the people specifically listed in CPLR 311, the corporation itself may create its own internal system for receiving process, which may not necessarily be known to anyone outside the corporate structure and cannot be used to avoid service (*id.* at 272). Further, in such a system, "if service is made in such a manner which, objectively viewed, is calculated to give the corporation fair notice, the service should be sustained (*id.*). Certainly, in the absence of any other information regarding how to effect service, serving process with a property manager employed by the same management company, though not a manager for the respondent's corporation, at the address listed as the Respondent's principal executive office and where, if the petitioner had served the Department of State, process would have been mailed, is objectively reasonable and calculated to give the Respondent fair notice.

In addition, the Petitioner also effected service on Fleetwood through the NYSDOS on September 17, 2018 after receiving the Respondent's Motion to Dismiss (Business Corporation Law 306 (b)(1)).

Turning next to the timing of the service. The Respondent contends that service on September 6, 2018 was untimely because it was effected less than 20 days from the September 20, 2018 return date on the Petition and accordingly, that the Court is without jurisdiction (CPLR 7804 (c)). Less than strict compliance with the timing for service may be viewed as a "mere irregularity"if there is no resultant prejudice to the respondent (*Matter of Marmo v Department of Envtl. Conservation*, 134 AD2d 261 [2nd Dept. 1987]). Although service 14 days before the return date seems to be pushing the limits of "mere irregularity" (*Brown v Cassier*, 95 AD2d 574 [3rd Dept. 1983][upholding service 16 days prior to the return date]), and the Petitioner has offered no reason why they did not strictly comply with the service requirements for a return date that they had chosen, the Court does not find, however, that the Respondent has demonstrated any prejudicial effect for having been served on September 6, 2018 rather than September 1, 2018. Counsel for the Respondent has suggested that the Jewish High Holy Days occurred during the time period between when service was completed to when the return date was set and therefore, the answering papers and motion to dismiss was not as complete as they could have been. It is assumed by the Court, but never put forth by the Respondent, that Counsel or someone else required to complete the paperwork was observing the holidays. However, Respondent's Counsel has been practicing in this field for years if not decades. In fact Counsel's website boasts of more than 100 years of legal experience. Nevertheless, Counsel never even attempted to extend the return date to so as to give themselves more time to better complete the

Respondent's papers. The Respondent has also not shown what they would have added to the papers had they more time nor how they are otherwise incomplete. Accordingly, the Respondent's motion to dismiss is denied.

Turning towards the merits of the case, the thrust of the Respondent's defense rests upon the flawed premise that Fleetwood is a not for profit entity, even though it is organized under the Business Corporation Law and therefore should be treated as such when it comes to its corporate responsibilities. The Respondent has not offered any authority to back this claim which runs counter to prevailing law. A cooperative corporation is defined as corporation formed, "for the cooperative rendering of mutual help and service to its members" and a membership cooperative is specifically defined as, "a non-stock cooperative which admits only natural persons to memberhship" (Cooperative Corporations Law 3 (c) and (k)). Although Cooperative Corporations are classed as non-profit corporations (Cooperative Corporations Law 3 (d)), the Business Corporation Law is applicable to "every corporation heretofore or hereafter formed under this chapter...which has as its purpose or among its purposes the cooperative rendering of mutual help and service to its members...except a membership cooperative...to which not-for-profit corporation law shall apply" (Cooperative Corporations Law (5)(1)).

There exists in New York, both a common-law and statutory right to inspect corporate records (*Peterborough Corp. v Karl Ehmer, Inc.*, 215 AD2d 663 [2nd Dept. 1995]). The basis of this right derives from a shareholder's investment in a corporation and the right to protect that investment (*Crane Co. v Anaconda Co.*, 39 NY2d 14 [1976]). The right at common law can only be asserted where the shareholder is acting in good faith, and the request is made for a proper purpose, speculation or mere curiosity do not qualify as proper purposes (*Id.* at 18-19). Statutorily, under Business Corporations Law section 624, such access will be granted only to qualified shareholders upon a written demand. This request may be denied if the shareholder does not provide an affidavit that the "inspection is not desired for a purpose...other than the business of the corporation and that the petitioner has not been involved in the sale of stock lists within the last five years" (*Id.* at 19-20). If the corporation denies access the petitioner has a right to seek enforcement in the Supreme Court, but must allege compliance with the statute. If that is done then the burden shifts to the respondent to show the request was made in bad faith or improper purpose (*Id.* at 20).

Addressing, first, the Petitioner's request for an un-redacted, updated record of Fleetwood's shareholder's names and addresses. The provision in Business Corporation Law section 624 is to be liberally construed to enable communication between shareholders regarding corporate affairs and includes the disclosure of, not only the list shareholder's names, but addresses as well (*Bohrer v International Banknote Co.*, 150 AD2d 196 [1st Dept. 1989]). The Petitioner was given an outdated list with some of the names and addresses redacted. The Respondent claimed that the reason they were not provided was because the individual shareholders had requested that their names and other contact information remain private, but has provided no authority giving them the permission to withhold such information. In initiating this enforcement action, the Petitioner had executed an affidavit which states his purpose for requesting the un-redacted shareholder list was for the express purpose of running for a position on the Fleetwood Park Board of Directors.

The Court has considered the submissions of both parties and ORDERS that the Respondent provide the Petitioner with a copy of the un-redacted and updated list of all of the shareholders and their addresses (*Griffin v Varflex Corp.*, 79 AD2d 857 [4th Dept. 1980]). Although the Petitioner has not complied with the statutory affidavit requirements, the Court does find that under the common-law right of inspection by his Affidavit in Support of his Petition and Exhibit F of his Petition he has asserted a proper purpose for his request and has

done so in good faith. Importantly, the Respondent has made no showing otherwise (*Crane Co.* at 18-19).[1]

The same cannot be said for the Petitioner's request to inspect the corporate books. With respect to the Petitioner's request to see Fleetwood's financial books, in particular, "invoices for the past 12 months, the monthly financial reports for the past 36 months, the financial records documenting the amount paid for all painting done at the Respondent's buildings for the past 3 years, financial records regarding parking charges for the past three years, and a breakdown of the payments made under the 'sundry' heading of the summaries for the past three years," the Court finds that not only has he not complied with the statutory provisions, but he has made no showing that would satisfy the common-law considerations either. The only semblance of a reason for requesting such inspection is found in Counsel's Affirmation which states that, upon his information and belief, in 2017 the Petitioner had unspecified, "concerns regarding his investment" in Fleetwood. He has not made any showing that his request is based on anything other than speculation or made for any other reason than to simply satisfy his own curiosity, which are not reasons to grant his Petition (*Id.*). Accordingly, the portion of the Petition seeking inspection of Fleetwood's financial records is DENIED. The Court awards no attorney's fees to either party and each party must bear their own costs.

The foregoing constitutes the opinion, decision and order of this court.

Dated: White Plains, New York
August 2, 2019

Honorable George E. Fufidio, A.J.S.C.

TO: New York Courts Electronic Filing System

[1]Despite the Respondent's insistence that a hearing must be held, there is no requirement for a hearing where the Respondent has not made a showing of bad faith or improper purpose (*Dyer v Indium Corp. of America*, 2 AD3d 1195 [3rd Dept. 2003]; *RDR Associates, Inc. v Media Corp. of America*, 63 AD2d 888 [1st Dept. 1978]).