GDLC, LLC v Toren Condominium
2016 NY Slip Op 32105(U)
October 21, 2016
Supreme Court, New York County
Docket Number: 157284/2016
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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GDLC, LLC AND MICHAEL SALZHAUER,

Petitioners,

-against-

THE TOREN CONDOMINIUM, BOARD OF MANAGERS OF THE TOREN CONDOMINIUM, THE RESIDENTIAL BOARD OF MANAGERS OF THE TOREN CONDOMINIUM

Respondents.

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DECISION & ORDER
Index No. 157284/2016
Mot. Seq: 001

ARLENE P. BLUTH, JSC

The petition by petitioners for judgment pursuant to Article 78 compelling the production of respondents' books and records is granted.

The cross-motion by respondents to change the venue to Kings County, stay the proceeding, or in the alternative to dismiss the proceeding for failure to state a cause of action is denied.

The cross-motion by Myrtle Owner LLC (Myrtle) for leave to intervene and to dismiss this proceeding is denied.

BACKGROUND

This proceeding arises out of petitioners' request to inspect and copy the books and records of respondents. Petitioners claim that although petitioner Salzhauer (a principal of petitioner GDLC) is a member of the Commercial Board of Managers of the Toren

Condominium (Condominium), his requests for copies of certain documents were denied. Petitioners seek documents including the condominium's 2015 and 2016 financial statements, its 2016 budget, and a settlement agreement between the board and the condominium's sponsor/developer. This settlement agreement allegedly arose out of a litigation commenced in 2011 by the Condominium against its sponsor, in which the Condominium asserted *inter alia* that its building's design and construction were defective and there were multiple violations of the New York City Building Code. Petitioners assert that the allegations in the complaint affected the entire building. Petitioners claim that respondents "secretly" settled the litigation against the sponsor in October 2015 without petitioners' input or knowledge and now refuse to disclose any documents.

Petitioners also claim that in anticipation of the litigation against the sponsor, respondents commissioned a report from RAND Engineering & Architecture, DPC to assess the physical conditions of the building (RAND Report). Petitioners assert that respondents have also refused to turn over a copy of the RAND Report despite the fact that petitioners already signed a confidentiality agreement at the request of a prior Condominium Board. Petitioners request a copy of the RAND Report in this proceeding.

Petitioners argue that as a sitting member of the Condominium Board, a sitting member of the Commercial Board and as an owner of the Condominium's largest commercial tenant, they have the fiduciary obligation to inspect the documents requested in this proceeding.

In opposition to petitioners' petition and in support of their cross-motion, respondents claim that the Court should change the venue to Kings County. Respondents further claim that

petitioners have brought this proceeding against the wrong parties with the wrong procedure and that petitioners are not entitled to the relief they seek.

VENUE

Respondents claim that venue should be changed to Kings County because that is where the Condominium is located. Respondents allege that because that is also where the purported action or inaction occurred, this Court must transfer this proceeding to Brooklyn.

In opposition to this branch of respondents' motion, petitioners claim that respondents have failed to meet their burden to establish that venue is improper in New York County. Petitioners argue that all of the material events surrounding this proceeding occurred in New York County. Petitioners allege that the books and records sought are located in New York County. Petitioners also claim that respondents' managing agent is located in this judicial district Even the lawsuit that produced the settlement agreement that petitioners now seek was brought and litigated in New York County.

CPLR 506(d) provides that "a proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law . . . or where the material events otherwise took place."

"The location of the material events usually will and should govern venue. The location of material events is the county wherein occurred the underlying events which gave rise to the official action complained of" (*Brothers of Mercy Nursing and Rehabilitation Ctr. v De Buono*, 237 AD2d 907, 908, 654 NYS2d 921 [4d Dept 1997] [internal citations and quotations omitted]).

Here, petitioners have adequately demonstrated that venue in this judicial district is proper. Petitioner asserted that material events involving respondents' refusal to turn over certain documents occurred in New York County including, but not limited to: the location of the books and records, the location of respondents' managing agent, the location of negotiations relating to a purported confidentiality agreement, and the venue of the litigation that produced the settlement agreement sought by petitioners.

Although the condominium building is located in Brooklyn, that is not wholly dispositive, especially where, as here, the requested documents are physically located in New York County. Therefore, this petition was properly brought before this Court and respondents' request to stay this proceeding pending a transfer is denied.

DISMISSAL CLAIM

Respondents move to dismiss petitioners' petition on the ground that mandamus is not available in the instant proceeding. Respondents insist that petitioner seeks to compel respondents to perform a discretionary act rather than a ministerial act subject to mandamus. Respondents claim that the settlement agreement sought by petitioners cannot be sought pursuant to the statutory authority cited by petitioners.

Respondents further claim that the business judgment rule prevents petitioners from receiving their requested relief. Respondents contend that this Court cannot substitute its own judgment in place of the board's opinion that the settlement agreement must remain confidential and that the board must impose obligations on all board members to preserve such confidentiality.

Respondents also insist that they have not refused inspection of the books and records. Respondents seek sanctions against petitioners for naming the residential board and the Condominium as respondents in this proceeding and seek attorneys fees from petitioners.

In opposition, petitioners claim that an Article 78 is the proper proceeding for obtaining petitioners' requested relief. Petitioners also claim that because petitioner Salzhauer is a board member, he has an unfettered right to inspect the books and records. Petitioners argue that Salzhauer cannot fulfill his fiduciary duties as a board member without inspecting the requested documents. Petitioners dispute that the business judgment rule prevents the inspection of the books and records, including the settlement agreement.

Petitioners also insist that GDLC, as a unit owner, has a right to inspect and copy respondents' books and records as long as GDLC has a good faith purpose for its request. Petitioners assert that GDLC has numerous good faith reasons for its request, including that the potential dangers at issue in the underlying litigation with the sponsor are properly abated.

As an initial matter, an Article 78 proceeding is a mechanism for the relief petitioners seek. An Article 78 proceeding for mandamus to compel "lies only to compel the performance of a purely ministerial duty and only where the party seeking mandamus demonstrates a clear legal right to that relief" (*Guzman v 188-190 HDFC*, 37 AD3d 295, 296, 830 NYS2d 112 [1st Dept 2007]). Under CPLR 7802, an Article 78 proceeding may be brought against a ***body***, which "includes every court, tribunal, ***board***, corporation, officer . . . whose action may be affected by a proceeding under this article" (CPLR 7802[a] [emphasis added]). Clearly, petitioners are permitted to bring this proceeding against the board.

"Mandamus does not lie to enforce the performance of a duty that is discretionary, as opposed to ministerial" (*New York Civil Liberties Union v State*, 4 NY3d 175, 184, 791 NYS2d 507 [2005]). "A discretionary act involves the exercised of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule to standard with a compulsory result" (*id.*) "A CPLR article 78 mandamus proceeding to compel an inspection is proper so long as the petitioner demonstrates a clear legal right to the requested relief" *(Berkowitz v Astro Moving & Stor. Co.*, 240 AD2d 450, 451, 658 NYS2d 425 [2d Dept 1997]).

"[T]o perform his directing duties, a corporate director must, of course, keep himself informed as to the policies, business affairs of the corporation, and as to the acts of its officers . . . and he may be subjected to liability for improper management during his term of office" (*Cohen v Cocoline Products*, 309 NY 119, 123 [1955]). "Because of these positive duties and potential liabilities, the courts of this State have accorded to corporate directors an absolute, unqualified right, having its roots in the common law, to inspect their corporate books and records" (*id.* at 907-08).

Just like corporate directors, the board members of a condominium have a fiduciary duty to the a condominium and individual unit owners (*see Kaung v Bd. of Mgrs. of Biltmore Towers Condominium Assn.*, 22 Misc 854, 873, 873 NYS2d 421 [Sup Ct, Westchester County 2008]). Under the foregoing standard, petitioner Salzhauer is entitled to inspect and copy the books and records, including the settlement agreement and the RAND report. In order to fulfill a board member's fiduciary obligations, board members need unfettered access to the books and records of the condominium. In the instant proceeding, petitioner Salzhauer would not be fulfilling his

fiduciary duties as a board member, and could theoretically face individual liability, if he did not inspect a settlement agreement that purportedly binds the board and the entire condominium.

Respondents' claim that Salzhauer should sign a confidentiality agreement is not a valid reason to refuse access to the requested documents. The same fiduciary duties that compel Salzhauer to inspect these documents would also compel him to maintain any confidentiality terms contained in the settlement agreement. If, as respondents contend, the Condominium faces potentially enormous damages if Salzhauer fails to maintain the confidentiality of the settlement agreement, respondents may have legal options to remedy those wrongs if there is a breach.

Respondents' claim that the business judgment rule justifies its refusal to turn these documents over is misplaced. "The business judgment rule is a common-law doctrine by which courts exercise constraint and defer to good faith decisions made by boards of directors in business settings" (*40 West 67th St. Corp. v Pullman*, 100 NY2d 147, 153, 760 NYS2d 745 [2003]). Here, even if the business judgment rule were applicable, which the Court questions, the Court finds that respondents have failed to demonstrate that they made a good faith decision by refusing to turn over critical documents to an individual board member who is purportedly bound by these documents. Respondents failed to cite a case where the business judgment rule applies to protect the majority of the board from its decision to shut out an individual duly elected board member.

GDLC is also entitled to the requested documents. "The unit owners of a condominium collectively own the common elements thereof and are responsible for the common expenses. Thus, the rationale that existed for a shareholder to examine a corporation's books and records at common law applies equally to a unit owner vis-a-vis a condominium" (*Pomerance v McGrath*,

104 AD3d 440, 441, 961 NYS2d 83 [1st Dept 2013] [holding that a unit owner in a condominium was not limited to requesting and examining only those documents listed in Real Property Law § 339-w]. Because the common law applies equally to a unit owner and a shareholder, the request may cover extensive records as long as "the shareholders seek the inspection in good faith and for a valid purpose" (*Pomerance v McGrath*, – NYS3d –, 2016 NY Slip Op 06462, *2 [1st Dept 2016] [holding that plaintiff, as a condominium unit owner, was entitled to inspect all past, present, and future monthly financial reports, building invoices, redacted legal invoices, and board meeting minutes]).

Here, GDLC has many reasons to inspect the requested documents, including the fact that it may be bound by a settlement agreement with the condominium's sponsor and that the alleged design defects might affect its unit.

The residential board and the Condominium are proper parties to this proceeding because petitioners seek the production of the Condominium's financials, budget and the RAND Report, all or part of which may be in these respondents' possession. Further, as petitioners correctly argue, the Residential Board is a subsidiary of the Condominium Board and Salzhauer (as a member of the Condominium Board) is entitled to the books and records of the Residential Board.

Respondents' claim for attorneys' fees is denied.

INTERVENOR

Myrtle moves to intervene in this proceeding and, upon intervention, to dismiss the petition. Myrtle claims that it is the sponsor of the Condominium. Myrtle asserts that as part of

its settlement agreement with the board, there was a confidentiality agreement and certain documents, including the RAND Report, were deemed confidential.

Myrtle claims that it should be permitted to intervene because it is an interested person who will be directly affected by the outcome of the proceeding. Myrtle contends that it would be affected by the potential release of a confidential settlement agreement and the RAND Report about alleged construction defects.

Myrtle claims that an Article 78 proceeding cannot be commenced against an unincorporated association.

Petitioners assert that intervention is not warranted because the instant dispute is "intra-condominium" and the Myrtle has no interest in a sitting board member's access to a settlement agreement that binds the board. Petitioners also dispute that Myrtle would be directly affected by the outcome. Petitioners also claim that case law clearly allows for an Article 78 proceeding to be commenced when a unit owner or board member seeks to inspect the books and records of a condominium.

The Court "may allow other interested persons to intervene" in an Article 78 proceeding (CPLR 7802[d]). "Intervention lies in the sound discretion of the Court" (*New York County Lawyers' Assn. v Bloomberg*, 30 Misc 3d 161, 162, 908 NYS2d 872 [Sup Ct, NY County 2010]). "The general rule is that intervention should be permitted where the intervenor has a real or substantial interest in the outcome of the proceedings" (*id.* at 163).

Here, Myrtle does not have a real or substantial interest in whether a ***sitting*** board member gets access to the settlement agreement (an agreement that, presumably, contains terms that bind every board member) or to confidential documents. As described above, petitioner

Salzhauer has a fiduciary obligation to abide by the terms of the settlement agreement and to maintain the confidentiality of the RAND Report. If this confidentiality is breached, Myrtle has a remedy– according to respondents, the condominium faces substantial damages if the settlement agreement is breached. At this stage, it is pure speculation to suggest that petitioners' access to these documents would result in a breach of confidentiality. Myrtle even admits that there is only a "potential" release of confidential documents (*see* Myrtle's memorandum of law at 4).

Even if the Court permitted Myrtle's intervention, its request to dismiss this proceeding would be denied. Myrtle claims that case law does not allow petitioner to bring the instant proceeding. Myrtle's strongest citation is to *Brasseur v Speranza* (21 AD3d 297, 800 NYS2d 669 [1st Dept 2005]), for the proposition that mandamus claims under Article 78 are not permitted against condominiums. However, a closer reading of Myrtle's brief indicates that Myrtle's counsel omitted the phrase "bylaw breach" from its cited quotation. The quotation *actually states* "Condominiums, generally regarded as unincorporated associations, are not amenable to article 78 proceedings in the nature of mandamus **for claims of bylaw breach**" (*id.* at 297 [emphasis added]). The omission of the last five words drastically changes the scope of the purported holding.[1] As stated above, this proceeding is appropriate.

Accordingly, it is hereby

ORDERED that petitioners' petition to inspect books and records is granted and petitioners must be permitted to inspect and copy the Condominium's 2015 and 2016 financial

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[1]The Court does not seek to imply that this omission was intentional. However, at the very least, counsel should have ensured that this quotation did not misrepresent the holding of the case.

statements, the Condominium's 2016 budget, the settlement agreement between the board and the Condominium's sponsor and the RAND Report; and it is further

ORDERED that respondents must provide for petitioners to inspect and copy these documents on or before November 29, 2016 at a mutually agreeable time and place; and it is further

ORDERED that respondents' cross-motion and Myrtle's cross-motion are denied; and it is further

ORDERED that the clerk is directed to enter judgment for petitioners.

This is the Decision and Order of the Court.

Dated: October 21, 2016
New York, New York

ARLENE P. BLUTH, JSC