

No. 20-CI-005226

JEFFERSON CIRCUIT COURT
BUSINESS COURT DOCKET
DIVISION TEN (10)
JUDGE ANGELA MCCORMICK BISIG

JEFFREY P. WILKINS

PETITIONER

vs.

ORDER REGARDING
MOTION FOR
SUMMARY ORDER OF INSPECTION

LASTIQUE INTERNATIONAL CORP.

RESPONDENT

* * * * *

This matter comes before the Court on a Motion for Summary Order of Inspection filed by Petitioner Jeffrey P. Wilkins (“Wilkins”) on October 23, 2020. Respondent Lastique International Corp. (“Lastique”) filed a Response on November 12, 2020. Wilkins filed a Reply on November 23, 2020. Lastique filed a Sur-Reply on January 22, 2021, and Wilkins filed a Sur-Surreply on January 27, 2021.

The Court heard oral argument on December 28, 2020. The Honorable Clark C. Johnson represented Wilkins. The Honorable William H. Mooney represented Lastique. The matter now stands submitted. The Court, having considered the written memoranda, oral argument, record in the case, and being otherwise sufficiently advised, rules as follows.

BACKGROUND

This is an action for inspection of corporate books and records. Petitioner Wilkins was employed by Respondent Lastique for 22 ½ years before retiring in September 2020. Wilkins also owns shares in Lastique.

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On June 12, 2020, Wilkins sent Lastique a shareholder demand for inspection of corporate records pursuant to KRS 271B.160-020. The requested records include articles of incorporation and bylaws, shareholder meeting minutes, written communications to shareholders, financial statements, tax returns, board meeting minutes, documents relating to board and committee actions taken without a board meeting, and all accounting records from 2014 forward. The demand recited that it was made in good faith and for the proper purpose of: 1) investigating corporate mismanagement, waste and wrongdoing, 2) determining whether improper transactions occurred, and 3) determining the value of Wilkins' shares in the company.

Wilkins and Lastique began to discuss a buyout of his shares within a month of his demand. The negotiations failed. Mr. Wilkins then notified Lastique on September 8, 2020 that he was retiring effective immediately.

To date, Lastique has produced only 2017, 2018, and draft 2019 financial statements in response to Wilkins' demand. Wilkins therefore filed this Action on October 23, 2020 for an order requiring Lastique to provide the remaining requested corporate records, and now moves for entry of such an order as well as an award of attorney's fees.

1. *Wilkins' Argument*

Wilkins argues that his demand is made for proper purposes, including investigation of corporate mismanagement and waste. Wilkins asserts his demand, affidavit, and deposition testimony establish that purpose. Wilkins contends that Lastique has nonetheless refused to produce many of the requested documents in violation of its statutory duties under KRS Chapter 271B. Wilkins further maintains that the burden is upon Lastique to prove that his demand is made for an improper purpose.

Wilkins further argues that he has demonstrated the requested records relate to his stated purposes because he needs Lastique's accounting records to determine whether improper transactions have occurred and to value his shares. Finally, Wilkins maintains he should be awarded attorney's fees because Lastique has not shown it had a good faith basis for denying his demand, and because Lastique has produced only two documents totaling thirty-three pages.

2. *Lastique's Argument*

Lastique argues there are genuine issues of material fact as to whether Wilkins' demand is made in good faith and for a proper purpose. Lastique contends Wilkins' failure to obtain the records he now requests while employed demonstrates the lack of a valid purpose for his present demand. Lastique further asserts Wilkins' allegation that loans were made to shareholders and employees with no intention of repayment is not a credible basis to believe corporate mismanagement may have occurred because it is based solely on the fact the loan balances have not changed in seven to eight years.

Similarly, Lastique argues there is no credible basis for Wilkins' desired investigation into use of company funds for personal expenses because he has no knowledge of whether the company was reimbursed for any such expenditures. Lastique also maintains Wilkins' allegation of disproportionate distributions relates to a wholly separate entity and therefore is not a credible basis to obtain Lastique's corporate records. Lastique asserts Wilkins' alleged purpose of valuing his shares is also not credible because the company has provided him with annual share valuations. Lastique contends the temporal proximity of Wilkins' demand with negotiations for a buyout of his shares suggests his true purpose is to obtain leverage.

Lastique further argues that Wilkins has not described the records he seeks with reasonable particularity or shown that such records are directly connected with his purpose.

Finally, Lastique asserts Wilkins is not entitled to an award of attorney's fees because Lastique has not refused to produce documents to him and because any delay has been due to a good faith doubt in Wilkins' right to inspection.

OPINION

1. *Summary Judgment Standard*

The Parties agree that Wilkins' Motion is akin to a request for summary judgment and should be considered under CR 56 standards. Accordingly, the Court will treat Wilkins' Motion as one for summary judgment.

Civil Procedure Rule 56.03 authorizes summary judgment "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. The Court must view the record "in a light most favorable to the party opposing the motion, and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 480 (Ky. 1991).

Summary judgment is proper when "it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255, 256 (Ky. 1985) (quoting Roberson v. Lampton, 516 S.W.2d 838, 840 (Ky. 1974)). The term "impossible" is used in a practical sense and not in an absolute sense. Perkins v. Hausladen, 828 S.W.2d 652 (Ky. 1992).

When considering a motion for summary judgment, the "focus [of the court] should be on what is of record rather than what might be presented at trial." Welch v. Am. Publ'g Co. of Kentucky, 3 S.W.3d 724, 730 (Ky. 1999). "The party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary

judgment.” Hallahan v. The Courier-Journal, 138 S.W.3d 699, 705 (Ky. App. 2004). The non-movant cannot defeat a properly supported summary judgment motion “without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” Steelvest, 807 S.W.2d at 482. Even if a trial court believes the party opposing the motion for summary judgment may not succeed at trial, “it should not render a summary judgment if there is any issue of material fact.” Id. This is because it is the court’s duty to examine the evidence, “not to decide any issue of fact, but to discover if a real issue exists.” Id.

2. *Corporate Mismanagement, Waste, and Wrongdoing*

Kentucky law entitles a shareholder to inspect and copy certain corporate records upon demand if 1) the shareholder’s demand is made in good faith and for a proper purpose, 2) the shareholder describes with reasonable particularity his purpose and the records he desires to inspect, and 3) the records are directly connected with the shareholder’s purpose. KRS 271B.16-020(2), (3). If the corporation refuses to provide the demanded records, the shareholder may apply to the Circuit Court for an order permitting inspection. KRS 271B.16-040(2). The corporation bears the burden of showing that the demand is made for an improper purpose. Bennett v. Mack’s Supermarkets, Inc., 602 S.W.2d 143, 145-46 (Ky. 1979).

Wilkins first asserts that his demand is made for the purpose of investigating corporate mismanagement, waste, and wrongdoing and determining whether improper transactions have occurred. (Motion, Wilkins Aff.) Under Kentucky law, such a purpose is a proper basis for a demand for inspection of corporate books and records. See Bennett, 602 S.W.2d at 147 (holding that investigation of possible improper expenditures and withdrawals was proper purpose for a shareholder demand for corporate books and records).

However, Lastique points to evidence of record sufficient to raise a genuine issue of material fact as to whether Wilkins' desire to investigate corporate misconduct is in fact the proper and good faith basis of his demand. First, while Wilkins testified he believes Lastique made loans to employees knowing that they would not be repaid, he also testified his belief was based solely upon the fact that the loan balances had not changed in a number of years. Moreover, he acknowledged that he does not know the terms of the loans. Second, Wilkins also acknowledged in his testimony that while he believed corporate employees had used company funds for personal expenses, he had no knowledge as to whether such expenses had been reimbursed. Third, Wilkins' allegations of improper transactions appear to relate to a third-party entity rather than Lastique. Finally, a reasonable trier of fact could conclude that the temporal proximity between Wilkins' demand and his negotiations with Lastique for a buyout of his shares evidences an improper purpose of obtaining leverage in those negotiations. Accordingly, given the thinness of Wilkins' allegations of corporate misconduct and the timing of his demand, the Court finds that there remains a genuine issue of material fact as to whether his demand is made in good faith and for the proper purpose of investigating corporate misconduct or for an improper purpose of obtaining leverage in the buyout negotiations.

3. *Share Valuation*

Wilkins' second asserted purpose for his demand is for valuation of his shares. This is a proper purpose. See Cardiovascular Specialists, P.S.C. v. Xenopoulos, 328 S.W.3d 215, 219 (Ky. App. 2010). Moreover, Lastique offers no authority that Wilkins is required to rely upon the share valuations previously provided by Lastique rather than conducting his own examination of the relevant materials. As such, the Court finds that Wilkins may demand an inspection of Lastique records for the purpose of valuing his shares.

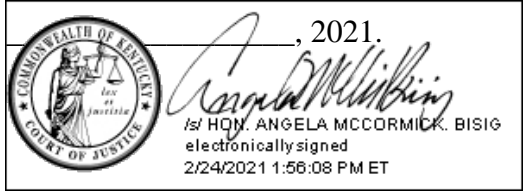
However, Wilkins must also describe with particularity the records he requests and establish that those records are directly connected with his purpose. KRS 271B.16-020(3)(b), (c). Here, Wilkins broadly requests “[a]ll accounting records of the Corporation for 2014 to the present, including but not limited to formal journals and ledgers, and the vouchers, invoices, correspondence, contracts, and other sources or support for such records.” Motion, Wilkins Aff. A broad request for “all accounting records” does not satisfy the statute’s requirement that the shareholder describe with particularity the records sought.

Wilkins also offers nothing more than a general assertion that he needs all the accounting records to value his shares, without any explanation as to how all the records would further his effort. Moreover, some of the records requested appear to be far beyond the scope of materials necessary for a share valuation, extending as far as individual invoices, correspondence, and underlying sources and support for all accounting records. As such, the Court also cannot find that Wilkins has shown at this time that the records requested are directly connected with a valuation of his shares. See Xenopoulos, 328 S.W.3d at 219 (reversing grant of inspection where shareholder failed to explain “why the records are necessary for his stated purpose of stock valuation.”). Accordingly, because the Court finds that genuine issues of material fact remain as to whether Wilkins’ demand is based upon a proper purpose of investigating corporate mismanagement, waste, and wrongdoing, and because Wilkins has not described with particularity the records sought or shown that they are directly connected with his purpose of valuing his shares, the Motion for Summary Order of Inspection is DENIED.

ORDER

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Petitioner Jeffery Wilkins' Motion for Summary Order of Inspection is **DENIED**.

IT IS SO ORDERED this ____ day of _____, 2021.



**JUDGE ANGELA MCCORMICK BISIG
DIVISION TEN (10)
JEFFERSON CIRCUIT COURT**

cc: Clark C. Johnson
John D. Cox
William H. Mooney