

**IN THE CIRCUIT COURT OF GARLAND COUNTY, ARKANSAS
FIRST DIVISION**

COOPER COMMUNITIES, INC.

PLAINTIFF

v.

Case No. 26CV-18-1609

**HOT SPRINGS VILLAGE PROPERTY
OWNERS ASSOCIATION, INC.**

DEFENDANT

RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION

Defendant Hot Springs Village Property Owners Association, Inc. (the “Association”) submits this Response to Motion for Preliminary Injunction (“Motion”) filed by Plaintiff Cooper Communities, Inc. (“CCI”). Because CCI has failed to demonstrate that it will suffer irreparable harm absent the entry of an injunction and that it is likely to succeed on the merits of its claims, the Court should deny the Motion.¹

BACKGROUND

The Association was formed in 1970 and incorporated as a nonprofit corporation under Act 176 of 1963 (the “1963 Act”). CCI is a member of the Association. As an Association member, CCI has a right to inspect the “books and records” of the Association pursuant to Ark. Code Ann. § 4-26-218. This statute, which is titled “Books and accounting records,” provides:

- (a) Each corporation shall keep correct and complete books and records of account.
- (b) All receipts of moneys and expenditures shall be properly recorded according to accepted accounting principles.
- (c) A record of the proceedings of its members, board of directors, and committees shall be kept.

¹ CCI served the Association with the summons, complaint, and Motion on October 24, 2018. Accordingly, pursuant to Arkansas Rule of Civil Procedure 12(a), the Association’s answer or Rule 12 motion is due on November 23, 2018. The Association’s response to the Motion is due on November 7, 2018 pursuant to Rule 6. Accordingly, by filing this response, the Association does not waive, and hereby preserves, all defenses available to it under Rule 12. *See* Ark. R. Civ. P. 12(h)(1).

(d) A record of the names and addresses of its members entitled to vote shall be maintained at the principal office or place of business of the corporation.

(e) All books and records of a corporation may be inspected by any member for any proper purpose at any reasonable time.

Ark. Code Ann. § 4-26-218.

On September 25, 2018, CCI requested certain documents from the Association as set out in Exhibit A to CCI's complaint. However, this request did not contain any statement as to CCI's purpose in requesting the information as required by Ark. Code Ann. § 4-26-218(e). On October 11, 2018, CCI wrote another letter, attached as Exhibit C to its complaint, in which it stated its purpose for requesting records as follows:

As you know, the Association's Board of Directors ("Board") proposes to modify the Declaration and the Articles of Incorporation of the Association (the "Proposal"). The Proposal will have a significant impact on CCI's interests. The requests for information are all designed to provide CCI with information necessary to assess that impact and to prepare a course of action to protect those interests.

CCI's requests for records contained seven categories of documents it wished to copy, including the email address and telephone number of every member of the Association. In compliance with Ark. Code Ann. § 4-26-218, the Association made all of the information requested by CCI available for inspection, but not copying, with the exception of members' telephone numbers and email addresses and employment agreements or contracts between the Association and Lesley Nalley (the Association's CEO) and between the Association and a former employee, David Twiggs.

On October 24, 2018, CCI and its agents and accountants inspected tens of thousands of pages of documents that the Association made available, including the names and addresses of its members. Accordingly, the only information CCI has requested that has not been made

available for CCI's inspection is the email address and telephone number for every member of the Association, along with employment agreements or contracts between the Association and Lesley Nalley (the Association's CEO) and between the Association and a former employee, David Twiggs. These four categories of documents ("the Disputed Documents") are the subject of this lawsuit and the Motion.

Three issues are before the Court on CCI's Motion for Preliminary Injunction. First, has CCI demonstrated a likelihood of success in having a "proper purpose" for requesting the Disputed Documents? Second, does CCI have a right to copy, or to compel the Association to copy for CCI, the "books and records" of the Association set out in Ark. Code Ann. § 4-26-218? Third, are members' emails and telephone numbers "books and records" required to be kept and available for inspection under Ark. Code Ann. § 4-26-218? Based on the plain and ordinary meaning of Ark. Code Ann. § 4-26-218, the Court should answer "no" to these questions and deny CCI's Motion for Preliminary Injunction.

STANDARD FOR PRELIMINARY INJUNCTION

This Court has two considerations upon a petition for a preliminary injunction: "(1) whether irreparable harm will result in the absence of an injunction; and (2) whether the moving party has demonstrated a likelihood of success on the merits." *Munraqim v. Hobbs*, 2017 Ark. 97, * 3, 514 S.W.3d 464, 647. Harm is deemed "irreparable" "when it cannot be adequately compensated by money damages or redressed in a court of law." *Manila School Dist. No. 15 v. Wagner*, 256 Ark. 149, 153, 148 S.W.3d 244, 246 (2004). As the moving party, CCI "bears the burden to prove a reasonable probability of success on the merits." *Munraqim*, 2017 Ark. 97, at* 3, 514 S.W.3d at 647. (internal quotations omitted).

ARGUMENT

I. CCI HAS NOT DEMONSTRATED THAT IT WILL SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION.

No injunction should be issued because CCI has an adequate remedy at law. *Manila School Dist. No. 15*, 256 Ark. at 153, 148 S.W.3d at 246. The 1963 Act does not contain any mechanism for a member to enforce its inspection rights. However, the common law remedy of mandamus is available to enforce such rights. *See, e.g., McMahon v. Dispatch Printing Co.*, 129 A. 425, 426 (N.J. 1925); *Ex Parte Miltope Corp.*, 823 S.2d 640, 643. “[M]andamus is designed to enforce legal rights and is essentially a procedure at law.” *Nethercutt v. Pulaski County Special School Dist.*, 248 Ark. 143, 146, 450 S.W.2d 777, 778 (1970). The Arkansas Supreme Court has recognized that a writ of mandamus can be used to require private corporations to perform certain acts. *See, e.g., Rowland v. Saline River Ry. Co.*, 119 Ark. 239, 177 S.W. 896 (Ark. 1915). Accordingly, if CCI believes that it has a right to access the Disputed Documents and that it has a right to make copies of all information regarding the Association and its members, it may file a petition for a writ of mandamus which this Court can entertain and rule upon.

Moreover, CCI has not and cannot demonstrate any other irreparable harm. At most, CCI argues that it “will suffer irreparable harm...because [it] will be deprived of its right to be informed of the facts and the ability to act thereon.” CCI’s Brief in Support of Motion for Preliminary Injunction at p. 8. CCI fails to explain how access to the Disputed Documents constitute “facts” necessary for CCI to take informed action with respect to its vote on any

amendments to the Association’s Declaration and Articles of Incorporation. CCI’s argument that irreparable harm is established by its not receiving information is unavailing.²

II. CCI HAS NOT DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS.

A. CCI has not shown a proper purpose for an inspection of the Disputed Documents.

Pursuant to Ark. Code Ann. § 4-26-218(e), a member requesting information subject to that statute must have a proper purpose for making that request. CCI’s purported purpose is to “assess the impact” on CCI of several amendments to the Association’s Declaration and Articles of Incorporation to be voted on by Association members and to “protect” CCI’s unidentified “interests.” See Exhibit C to CCI’s complaint at p. 1, ¶ 2. As a member requesting access to the Association’s books and records, CCI bears the burden of showing that it had a proper purpose for its request. See *Ashley Bancstock Co. v. Meredith*, 2017 Ark. App. 598, *6, 534 S.W.3d 762, 766 (placing burden on the requester of records under the Arkansas Business Corporation Act of 1965).

A shareholder or members of corporate entity “should not be granted a roving license to pore at will through the books and records of the corporation without regard to the purpose for which he seeks the extraordinary remedy which the law gives to him.” *Holdsworth v. Goodall-Sanford, Inc.*, 55 A.2d 130, 132 (Me. 1947). Indeed, where as here, the information requested is private to each individual member of the Association or otherwise personnel-related, the Court should take pains to safeguard such information, especially in light of the Association’s long-

² Notably, CCI does not argue that it would suffer irreparable harm by being provided the right to inspect certain documents rather than having those documents copied for or by CCI.

standing policies on the subject adopted by its democratically elected board of directors. As aptly noted by the Court in *Holdsworth*,

[T]he power to order an inspection of books is so great, its exercise may affect unfavorably so many innocent stockholders...that the court ought to exercise the power with the greatest care, and only when a case is presented which indicates, not only a bona fide desire to safeguard the interests of all stockholders, but a probability that the interests of all will be served by the proposed investigation.

Id.

CCI's purported purpose³ in obtaining the Disputed Documents is to protect CCI's undefined "interests" in an upcoming vote. *See* Exhibit C to CCI's complaint at p. 1, ¶ 2. In the *McMahon* case, cited above, the court affirmed the denial of a writ of mandamus, reasoning that the petitioner's purposes:

make it quite manifest that the inspection sought by the petitioner is not founded upon any real belief that the affairs of the company are not conducted upon a financially sound basis, but, on the contrary, evince a clear design, on part of the petitioner for the writ, to carry to a conclusion the rancor of a political feud existing between him and the president of the company, regardless of the disastrous consequences which his uncalled for action might have on the credit of the company and the interests of other shareholders.

McMahon, 129 A. at 426-27. In its complaint, and in its letters requesting access to the Disputed Documents, CCI has no proper purpose for obtaining the Disputed Documents because those documents simply have no connection to the Proposal being considered by the Association's members.

B. Member email addresses and telephone numbers are not records to which CCI is entitled.

The Association is required by statute to maintain at its "principal office or place of business" "[a] record of the names and addresses of its members entitle to vote." Ark. Code Ann.

³ CCI has attached no sworn evidence in support of its Motion and, as such, there is no evidence before the Court to support issuance of an injunction. *See* Ark.R.Civ.P. 65(a)(2). The Association presumes that Mr. Donovan or his client will testify at a hearing on the Motion as to the purpose CCI had on October 11, 2018, the date of the Exhibit C to CCI's complaint.

§ 4-28-218(d). The Association is not required under the 1963 Act to maintain a list of member email addresses or telephone numbers. The Association already agreed and allowed CCI to inspect its record of the names and addresses of Association members entitled to vote. This inspection complies with Ark. Code Ann. § 4-28-218(e). *See, e.g., Walker I Investments, LLC v. Sunpeak Association, Inc.*, 359 P.3d 675 (Ut. App. 2015) (affirming denial of nonprofit member’s request for member email addresses and telephone numbers in addition to member names and addresses).

C. The statute does not confer upon CCI a right to copies of the Association’s books and records.

Members of nonprofit corporations governed by the 1963 Act have a right to “inspect” defined books and records upon compliance with the requirements of that act. *See* Ark. Code Ann. § 4-28-218(e). The 1963 Act does not give members the right to receive copies of corporate books and records. In reviewing Ark. Code Ann. § 4-28-218(e), this Court will “construe the statute just as it reads, giving the words their ordinary and usually accepted meaning in common language.” *Our Community, Our Dollars v. Bullock*, 2014 Ark. 457, *8, 452 S.W.3d 552, 557. “Moreover, it is well settled that this court will not read into a statute a provision that was not included by the General Assembly.” *Scoggins v. Medlock*, 2011 Ark. 194, *6, 381 S.W.3d 781, 785.

The General Assembly has not amended the 1963 Act to include the right to copy in addition to the right to inspect corporate documents. However, since 1963, it has passed several acts governing business entities that include the right of partners, shareholders, and members to inspect *and* copy records. *See, e.g.*, Ark. Code Ann. § 4-27-1602 (granting shareholders of corporations governed by the Arkansas Business Corporation Act of 1987 the right to inspect and copy certain documents); Ark. Code Ann. § 4-28-625 (allowing members and managers of an

entity formed pursuant to the Revised Uniform Unincorporated Nonprofit Association Act of 2011 the right to inspect and copy certain records); Ark. Code Ann. § 4-32-405 (granting the members and of a limited liability company organized under the Small Business Entity Tax Pass Through Act of 1993 the right to inspect and copy company records); Ark. Code Ann. § 4-46-403 (allowing partners in a partnership governed by the Uniform Partnership Act, passed in 1999, the right inspect records, which included by statute the right to copy records); Ark. Code Ann. § 4-47-304 (providing that limited partners in a limited partnership formed pursuant to the Uniform Limited Partnership Act, passed in 2007, may inspect and copy certain records). Despite over thirty years of legislation, which includes granting partners, shareholders, and members the right to copy books and records of various business entities, the General Assembly has left intact the 1963 Act, which grants to members the right of inspection only.

CONCLUSION

CCI has not demonstrated any irreparable harm by not having access to the Disputed Documents it has requested which have no connection to the proposal the Association's members will vote upon. If CCI believes that it has been denied anything it is entitled to as a member, which it assuredly has not been as set out above, it may seek a writ of mandamus, which itself will afford to it an adequate remedy at law. CCI has not articulated a proper purpose, it has no statutory right to member email addresses and telephone numbers or personnel-related contracts, and it has no right to make copies of books and records under the 1963 Act. Accordingly, CCI cannot show that it is likely to succeed on the merits. For all of these reasons, the Court should deny CCI's Motion for Preliminary Injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 7th day of November, 2018, the foregoing document was electronically filed with the Clerk of the Court by using the electronic filing system. A notice of electronic filing was sent to the following attorneys of record:

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