

<b>Board of Mgrs. of the Lux Condominium v Core Mgt. N.Y., LLC</b>
2020 NY Slip Op 34355(U)
December 21, 2020
Supreme Court, New York County
Docket Number: 160136/2017
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. NANCY M. BANNON PART IAS MOTION 42EFM

*Justice*

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THE BOARD OF MANAGERS OF THE LUX  
CONDOMINIUM

Plaintiff,

- v -

CORE MANAGEMENT NY, LLC,

Defendant.

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INDEX NO. 160136/2017

MOTION DATE 9/30/2020,  
9/30/2020

MOTION SEQ. NO. 006 007

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93, 97, 98

were read on this motion to/for CONTEMPT.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114

were read on this motion to/for CONVERT PROCEEDING.

In this proceeding to compel the respondent, the former managing agent of the Lux Condominium (the Condominium) to immediately produce to the petitioner all of the Condominium's books, records, information, and other items in the respondent's possession, custody, or control, the petitioner moves to hold the respondent in contempt pursuant to NY Judiciary Law § 753 and to impose a fine against the respondent pursuant to Judiciary Law § 773 (MOT SEQ 006). The respondent opposes the motion and moves pursuant to CPLR 103(c) to convert this special proceeding into a plenary action (MOT SEQ 007). The petitioner opposes that motion. The petitioners' motion is granted to the extent that a hearing is ordered. The respondents' motion is denied.

**A. Petitioner's Motion for Contempt (MOT SEQ 006)**

By so-ordered stipulation dated May 9, 2018, the respondent agreed to produce, return, and turn over to the petitioner by May 25, 2018, the items listed in an attached Schedule A,

which comprised all items sought in the petition, with minor modifications. By interim order dated May 30, 2018, the court noted that the respondent produced documents to the petitioner at 11:00 p.m. on May 25, 2018, that the petitioner picked up 17 boxes of documents from the respondent on May 29, 2018, and that as a consequence of the foregoing the petitioner had not yet had an opportunity to review the documents. As such, the court directed the petitioner to review the production and notify the respondent of any missing documents by July 25, 2018, and the petition was adjourned until August 3, 2018. By interim order dated August 10, 2018, upon learning that there remained uncured deficiencies in the respondent's document production, the court directed the respondent to produce to the petitioner, by August 24, 2018, (1) a flash drive of the QuickBooks native file for all of the Condominium's books and records maintained on the QuickBooks platform; (2) ADP native file access for the Condominium's files only; and (3) all email communications between Nick Spaho and Fation Spaho with any service providers to the Condominium on any email account between October 2016 through October 2017. The respondent failed to comply with the court's order. Instead, on August 24, 2018, the deadline for the production, the respondent filed an appeal of the court's August 10, 2018, interim order. On August 27, 2018, the petitioner filed a motion to punish the respondent for its failure to comply with the court's order, by awarding the petitioner actual expenses and reasonable attorneys' fees incurred in connection with this proceeding pursuant to 22 NYCRR 130-1.1(a), (c)(1), and (c)(2) (MOT SEQ 003).

By order dated April 10, 2019, the petition and the petitioner's motion for expenses and attorneys' fees were granted to the extent that the respondent was to produce all outstanding information, documents, and other items listed in Schedule A to the May 9, 2018 interim order, and the petitioner was awarded costs in the form of reimbursement for actual expenses reasonably incurred in connection with the proceeding and reasonable attorneys' fees, to be determined by a JHO or Referee. The hearing was adjourned by stipulation of the parties through January 16, 2020 and has not yet been held. By an order dated April 2, 2020, the Appellate Division affirmed this court's order dated April 10, 2019.

The petitioner brought the instant motion on January 30, 2020, alleging that the respondent had not complied with this court's April 10, 2019 order, as it had not provided the documents contained in this court's August 10, 2018, interim order or the April 10, 2019, order. The respondent opposed the motion, arguing that it has complied with the order inasmuch as it

produced the requested files, albeit in searchable PDF format rather than the native file format contained, as directed in the court's orders.

"Contempt is a drastic remedy which should not be granted absent a clear right to such relief." Pinto v Pinto, 120 AD2d 337, 338 (1<sup>st</sup> Dept. 1986). To prevail on a motion to punish a party for civil contempt, a party must establish that the party to be held in contempt violated a clear and unequivocal court order, known to the parties. See Judiciary Law § 753(A)(3); see also McCormick v Axelrod, 59 NY2d 574 (1983), amended 60 NY2d 652 (1983). The movant must also establish that the party to be held in contempt engaged in conduct that was calculated to and actually did defeat, impair, impede, and prejudice the rights of the movant. See 450 West 14th St. Corp. v 40-56 Tenth Avenue, LLC, 15 AD3d 166 (1<sup>st</sup> Dept. 2005); Lipstick, Ltd. v Grupo Tribasa, S.A. de C.V., 304 AD2d 482 (1<sup>st</sup> Dept. 2003).

It is undisputed that the respondent violated a clear and unequivocal court order known to the parties inasmuch as it did not provide the native file for the condominium's books and records or ADP native file access for the condominium's files, as contemplated in this court's previous orders. However, to the extent that the respondent did provide the documents in a different format, a hearing is necessary to determine whether such action was calculated to and actually did defeat, impair, impede, and prejudice the rights of the petitioner. See 450 West 14th St. Corp. v 40-56 Tenth Avenue, LLC, supra. If so, the respondent will likely be required to at least pay the petitioner's attorney's fees.

#### B. Respondent's Motion to Convert Action (MOT SEQ 007)

The respondent's motion to convert this special proceeding into a plenary action is denied. CPLR 103(b) provides that "all civil judicial proceedings shall be prosecuted in the form of an action, except where prosecution in the form of a special proceeding is authorized." CPLR 103(c) provides that if an action is not brought in the proper form the court "shall make whatever order is required for its proper prosecution. If the court finds it appropriate in the interests of justice, it may convert a motion into a special proceeding, or vice-versa upon such terms as may be just." The respondent argues that there is no authority for this action to have been commenced as a special proceeding, and thus the action should be converted into a plenary action. The respondent further argues that as the special proceeding was improperly commenced, the court lacked authority to summarily award the petitioner the relief sought in its

pleadings. See Taskiran v Murphy, 8 AD3d 360 (2<sup>nd</sup> Dept. 2004). The respondent's position is without merit. Although the respondent is correct in observing that the petitioner cannot seek to bring this action pursuant to Business Corporation Law (BCL) § 624(d), as the BCL has been held not to apply to condominiums, courts have nonetheless found that condominium unit owners have analogous rights under the common law to inspect a condominium's books and records. See Pomerance v McGrath, 143 AD3d 443 (1<sup>st</sup> Dept. 2016); GDLC, LLC v The Toren Condominium, 53 Misc. 3d 1214(A) (Sup Ct, NY County 2016). The common-law right to inspect books and records is enforced by a special proceeding. See Crane Co. v Anaconda Co., 39 NY2d 14 (1976); Pokoik v 575 Realities, Inc., 143 AD3d 487 (1<sup>st</sup> Dept. 2016); Altschul v Butterfield Farms, Inc., 40 AD2d 654 (1<sup>st</sup> Dept. 1972). The same applies to the right to compel the return of corporate books and records. See Rogers Engraving Co. v Greenberg, 97 NYS2d 440, 441 (Sup Ct, NY County 1950); see also Gay Cottons, Inc. v Hogan, 55 Misc. 2d 126 (Sup Ct, NY County 1967).

Moreover, as correctly noted by the petitioner, the respondent has significantly delayed in bringing this motion. This motion was made over two years after the petitioner commenced this special proceeding, and after extensive motion practice, arising from the respondent's failure to comply with the terms of its own stipulation, subsequent appeals therefrom and the determination of the petition. Even if conversion of this special proceeding into a plenary action was warranted, which it is not, that would only serve to further delay this action and would not substantively change the outcome sought by the petitioner, as it would still be entitled to the return of its books and records under a theory of conversion. See D'Amico v First Union Nat. Bank, 285 AD2d 166 (1<sup>st</sup> Dept. 2001).

Accordingly, it is hereby,

ORDERED that the petitioner's motion to hold the respondent in contempt pursuant to NY Judiciary Law § 753 and to impose a fine against the respondent pursuant to Judiciary Law § 773 (MOT SEQ 006) is granted to the extent that a hearing is ordered, and it is further,

ORDERED that the respondent's motion to pursuant to CPLR 103(c) to convert this special proceeding into a plenary action (MOT SEQ 007) is denied; and it is further,

ORDERED that the parties are to contact the court on or before January 29, 2021 to schedule the contempt hearing.

This constitutes the Decision and Order of the court.



NANCY M. BANNON, J.S.C.  
**HON. NANCY M. BANNON**

12/21/2020

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE