

## Court Clarifies Condo Owners' Right to Inspect

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In its 2013 decision in *Pomerance v. McGrath* (*Pomerance I*),<sup>1</sup> as noted by one of the authors in a prior article on the subject,<sup>2</sup> the Appellate Division, the First Department handed down the first appellate decision delineating the rights of condominium unit owners to inspect the books and records of condominium management. Although the courts had long held that shareholders of cooperative corporations had the right, under Business Corporation Law (BCL) 624(b), to obtain the names and addresses of other shareholder-tenants in connection with an election, no such statutory right was provided to condominium owners under the Condominium Act.

*Pomerance I* addressed this apparent disparity in the law regarding the right of inspection given to shareholder-tenants versus condominium unit owners and held that condominium unit owners were entitled to be given the contact information of other unit owners “in written form and any other format in which the condominium or its managing agent maintains such information.” The First Department has more recently decided *Pomerance II*<sup>3</sup> in which the court has further clarified the rights of condominium owners to inspect management books and records.

### ‘Pomerance I’

Unlike BCL 624(b), Real Property Law (RPL) §339-w limits the statutory right of condominium owners to examine the “receipts and expenditures arising from the operation of the property” and to receive an annual written report from the board of managers summarizing such receipts and expenditures. In *Pomerance I*, the First Department concluded that, although BCL 624(b) prescribed explicit inspection rights to shareholder-tenants, “the right of a stockholder to examine the books and records of a corporation existed at common law, and does not depend on a statute.” The court found that “the rationale that existed for a shareholder to examine a corporation’s books and records



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at common law applies equally to a unit owner vis-à-vis a condominium.” Therefore, the court concluded that condominium unit owners “should be given rights similar to those of a shareholder under [BCL 624(b)], at least where elections for a condominium board are concerned.” Thus, *Pomerance I* was limited to its facts and did not apply the court’s “rationale” to the inspection of other books and records that condominium unit owners might seek to examine.

### ‘Pomerance II’

In *Pomerance II*, the issue was whether or not the condominium owner also had the right “whether statutory or under the common law, to examine monthly financial reports, building invoices, minutes of board meetings, and appropriately redacted legal invoices.” The court held that the owner did have that right, “so long as she seeks to do so in good faith and for a valid purpose.” In addition, the First Department addressed the question of how the owner could receive the information she was allowed to examine.

The court noted that “Supreme Court [recognizing] plaintiff’s common law right to make paper copies,” and the First Department’s decision in *Pomerance I*, had “extended plaintiff’s inspection rights to include the right to receive, from defendants paper and, if the records are maintained in electronic form, electronic copies.” On appeal, the defendants argued that the “Supreme Court had conflated plaintiff’s right to examine records with a right to compel the board to deliver records into her possession.” (Emphasis added). The court agreed with defendants that RPL §339-

w “differentiates between a unit owner’s right to examine records and a board’s obligation to deliver records.” Nevertheless, although it said that defendants were correct that “the board does not have an obligation to mail or email to plaintiff copies of monthly financial reports, building invoices, redacted legal invoices or board meeting minutes,” the court held that the owner had the “right to examine these records at the managing agent’s office, during convenient weekday hours,” including “the right to create paper copies or electronic copies at her own expense during her inspection.”

The court further explained that in view of the owner’s “well established right to make paper copies while examining,” it did not see any reason “to differentiate between allowing plaintiff, during her inspection, to make paper copies, on the one hand, and, on the other hand, allowing her to create electronic copies, as is now common.”

The court limited the owner’s inspection right to examining the records at the managing agent’s office because “[d]efendants persuasively contend[ed] that monthly financial reports, and building or legal invoices, as opposed to a mere list of unit owners and their contact information, often contain confidential information.” However, while the court said it appreciated defendants’ confidentiality concerns, “we believe that these are sufficiently accommodated by requiring plaintiff to sign a confidentiality agreement.” The court noted that confidentiality agreements are a “common business practice,” and it is a “minimal burden for a board to provide unit owners a confidentiality agreement to sign before allowing access to paper or electronic copies of confidential records.” Of course, there is always a risk that an owner might breach a confidentiality agreement, but the court no doubt concluded that such risk is present whenever a confidentiality agreement is executed, and there is no reason to presume that the risk of a breach in the examination of condominium management records is any

greater than it is in other business situations.

Pomerance II is therefore a further step forward in equalizing the rights of condominium unit owners with the rights of cooperative shareholder-tenants in the inspection of management books and records. Of course, no matter how expansive the right of inspection may be in any given case, the owner is permitted to exercise that right only “so long as she seeks to do so in good faith and for a valid purpose,” and, as in Pomerance II, the right to exercise the right of inspection upon a showing of good faith is determined by the court after an evidentiary hearing.

It is interesting to note that in the Supreme Court, Justice Barbara Jaffe, who the First Department said had “extended plaintiff’s inspection rights to include the right to receive,” as opposed to the right “to examine” management’s records, had before her (and quoted in her decision) the Affidavit of David Clurman,<sup>4</sup> “one of the drafters of several portions of the [Condominium Act],” who explained that “it was the intention of the drafters [of the act] that the unit owners be able to inspect any and all financial records maintained by a condominium, any financial records reviewed by the board of the condominium, and all vouchers<sup>5</sup> of the condominium.” Jaffe noted also that Clurman “states that in directing that Section 339-w be liberally construed, ‘the drafters of the [act] intended that the court would rely on [Section 339-ii] to uphold the broadest possible rights for full disclosure to prospective purchasers and to unit owners.’”

### Conclusion

It is not possible to discern whether the First Department took note of the drafter’s intentions in deciding Pomerance II, but it is entirely possible that as the right of inspection continues to evolve, the courts may ultimately adopt the “broadest possible rights for full disclosure” as intended by the drafters.

### ENDNOTES:

1. 104 AD3d 440, 961 NYS2d 83 (1st Dept. 2013).

2. Bailey, Owners Rights to Inspect Management Records, New York Law Journal, April 10, 2013.

3. 143 AD3d 443, 38 NYS3d 164 (1st Dept. 2016).

4. Pomerance v. McGrath, Decision and Order, dated Dec. 1, 2015, Index No. 650129/11 (Motion Sequence Nos. 007, 008 (NYSCEF 220)).

5. Mr. Clurman explained in his affidavit that “[w]hen the Condominium Act was enacted, it was the practice that the board kept a voucher for each payment it made noting the payee, the amount and a short description of what the payment was for. Modern usage is for vendors and service providers to send invoices to the board, identifying what was provided and the charge. The term ‘vouchers’ in the Condominium Act corresponds to the term ‘invoices’ as presently used.”