

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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BLEECKER CHARLES COMPANY, suing :
derivatively on behalf of 350 BLEECKER STREET :
APARTMENT CORPORATION, :

Index No. /03

Plaintiff, :

**VERIFIED DERIVATIVE
ACTION COMPLAINT**

v. :

MARK LILIEN and JAMES D. KAFADAR :

Defendants. :

and :

350 BLEECKER STREET APARTMENT :
CORPORATION, :

Nominal Defendant. :

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Bleecker Charles Company, suing derivatively on behalf of 350 Bleecker Street Apartment Corporation, alleges, for its verified complaint, as follows:

Parties

1. At all times from 1985 to date plaintiff Bleecker Charles Company ("the Sponsor") has been continuously and still is a record and beneficial owner of the shares of common stock of nominal defendant 350 Bleecker Street Apartment Corporation ("the Co-op"). As of the date of this complaint, the Sponsor owns 4,042 shares of the total of 17,222 issued and outstanding such shares or 23.64% of such shares.

2. The Sponsor had been the owner of the fee simple interest from the early 1960s of the land and apartment building located at 350 Bleecker Street in the City, County and State of New York ("the Building"), when on July 31, 1985 the Sponsor conveyed fee title to the Building to the Co-op pursuant to a cooperative conversion plan declared effective under applicable New York law on that date.

3. Kenneth B. Newman, who is not a party to this action, has been the liquidating partner of the Sponsor at all times since 1984. He served as a director on the Board of Directors of the Co-op ("the Board") from 1984 through November 1999.

4. Defendants Mark Lilien ("Lilien") and James D. Kafadar ("Kafadar") have been and still are residents of the Building, and are each the owners of three separate apartment units in the Building ("units") evidenced by separate proprietary leases for such unit and related share certificates.

5. Lilien and Kafadar currently serve as directors of the Co-op. Lilien has served as a director at all times from October 1987 to the present and was Chairman from November 1999 until September 2002. Kafadar has served as director at all times from November 1995 to the present. Their service as directors has overlapped with Newman's service as a director. Thus, Lilien, Kafadar and Newman served as directors of the Co-op, along with others, from October 16, 1997 through October 16, 1999 ("the Window Period").

The Co-op's State Court Action

6. In an action in this Court entitled *350 Bleecker Street Apartment Corporation v. Newman et al.*, Index No. 11327/02 ("the Co-op's State Court Action"), the Co-op has filed a complaint (a copy of which is annexed as Exhibit A and which is verified by Lilien) against, among

others, Newman asserting that Newman allegedly breached his fiduciary duties to the Co-op and/or its shareholders, in his capacity as a director of the Co-op.

7. The Co-op's principal claim in the Co-op's State Court Action is that Newman, in his capacity as a director of the Co-op, allegedly breached his fiduciary duties to the Co-op by failing to disclose to the Co-op's Board and/or unit owners that the unit owners, by a two-thirds vote among them, had an alleged limited option, under the federal Condominium and Cooperative Conversion Protection and Abuse Relief Act, 15 U.S.C., §§3601-3616 ("the Act"), to terminate the portion of the Master Lease dated July 31, 1985 between the Co-op, as landlord, and the Sponsor, as lessee, for the parking garage in the Building ("the Garage Lease") and that this limited option had to be exercised by such unit owners and effectuated by notice to the Sponsor given and effective during the Window Period.

8. The Co-op's complaint in that action affirmatively alleges that directors other than Newman knew about the Act during the Window Period and the alleged limited option of the unit owners under the Act to terminate the Garage Lease.

9. Upon information and belief, Lilien and Kafadar had knowledge of the existence of the Act and the unit owners' alleged limited option thereunder to terminate the Garage Portion as early as January 1998, if not before. Lilien and Kafadar deliberately withheld their knowledge from the rest of the Board, including Newman, and most of the Co-op's unit owner shareholders, until on or about June 1, 1999 when Lilien and some other unit owner shareholders sent a notice dated June 1, 1999 to the Co-op's unit owner shareholders ("the 1999 Notice") calling for a meeting on June 24, 1999 to vote on a resolution to terminate the Garage Lease under the Act.

10. Newman did not know of the existence of the Act prior to receiving the 1999 Notice, although the complaint in the Co-op's State Court Action asserts — without any basis — that he had such knowledge. In his verified answer to the complaint in that action (a copy of which is annexed as Exhibit B), Newman asserts his lack of knowledge of the Act prior to his receiving the 1999 Notice and that Lilien's and Kafadar's earlier knowledge of the Act and of the alleged limited option of the unit owners thereunder is a complete defense to the claims against him.

11. If, as the complaint in the Co-op's State Court Action alleges, Newman could, in his capacity as an officer or director of the Co-op, have had an obligation to disclose to the Board and/or the Co-op's unit owner shareholders his knowledge (if he in fact had such knowledge) of the existence of the Act and the alleged limited option thereunder to terminate the Garage Portion during the Window Period, then Lilien and Kafadar, both of whom had such knowledge long before Newman, also had such an obligation.

The Sponsor's Demand and Futility of Demand

12. By letter dated October 23, 2002 and on that date, the Sponsor sent its demand to the Co-op's Board that the Co-op file suit against Lilien and Kafadar based upon the claims described above.

13. By letter dated December 9, 2002, counsel for the Co-op first acknowledged receipt of the Sponsor's demand letter dated October 23, 2002 and stated that the Board had come to no decision on the demand.

14. By letter dated December 20, 2002, counsel for the Co-op stated the Board had finally appointed a special committee ("the Special Committee") to consider the Sponsor's demand but that the Special Committee had reached no decision. No disclosure was made of the membership of the Special Committee, its charter or its proposed investigatory and evaluative plans.

15. On December 24, 2002, counsel for the parties in the Co-op's State Court Action, including counsel for Lilien and Kafadar who by this time had been sued by Newman on his third-party complaint for contribution, entered into a Stay Stipulation of the same date (a copy of which is annexed as Exhibit C). Pursuant to the Stay Stipulation, among other things, the Co-op, Lilien and Kafadar agreed that, if by January 31, 2003 the Co-op had not filed suit against Lilien and Kafadar, the Sponsor was free to file such a suit derivatively on behalf of the Co-op. Moreover, the Co-op waived several defenses to such a derivative action, including, among others, non-futility of a demand upon the Board that it bring such suit or that the Co-op, by its Board, any special committee or otherwise, was entitled to control or seek dismissal of any derivative action filed by the Sponsor. In addition, the Co-op agreed not to take any position on the merits of the claims asserted against Lilien and Kafadar in the derivative action brought by the Sponsor on behalf of the Co-op.

16. Thus, by the passage of time and inaction and by express agreement, the Sponsor is authorized by appropriate corporate action to proceed with this action on the merits.

FIRST CAUSE OF ACTION

17. The Sponsor incorporates by reference into this paragraph the allegations of paragraphs 1 through 16 of this complaint.

18. At all relevant times, under both New York common law and New York Business Corporation Law ("BCL") §717, in their respective capacities as directors of the Co-op, Lilien and Kafadar were under fiduciary obligations to act with due care and with complete loyalty to the interests of the Co-op.

19. At all relevant times, upon information and belief, both Lilien and Kafadar had knowledge of the Act and the alleged limited option of the unit owners thereunder to terminate the

Garage Portion long before they disclosed their knowledge to other members of the Board or the Co-op's unit owner shareholders generally.

20. Upon information and belief, if, as it claims in the Co-op's State Court Action, the Co-op failed to terminate the Garage Lease under the Act because its termination notice under the Act was untimely, then such failure was the result of Lilien and Kafadar's failure to disclose their knowledge of the Act to other members of the Board and/or to the unit owner shareholders of the Co-op generally from January 1998 until June 1, 1999, and then, to serve their own agendas, Lilien and Kafadar caused the Co-op to pursue meritless and expensive litigation by sending the termination notice to the Sponsor under the Act, by defending the Federal Action seeking to invalidate the termination notice, and by filing and prosecuting the Co-op's State Court Action.

21. By virtue of the foregoing misconduct, Lilien and Kafadar have also been responsible for the Co-op incurring legal fees and other costs totaling almost \$1 million, including but not limited to (a) the costs of defending the Federal Action and the Co-op's State Court Action and taking an appeal from an adverse judgment against the Co-op in that action, (b) the costs of prosecuting the Co-op's claims in the Co-op's State Court Action and defending the counterclaims in that action, (c) the costs of defending the claims for indemnification by Lilien and Kafadar in that action, (d) the costs of this action, (e) the costs of an ill-advised refinancing of the Co-op's mortgage to obtain funds to cover such costs and incurring substantial additional secured and unsecured debt for that purpose, and (f) the damage done to the Co-op from substantially impairing its reputation as a desirable and well-managed urban residential location.

22. By virtue of the foregoing, Lilien and Kafadar are jointly and severally liable to the Co-op for all damages resulting from their wrongdoing in an amount to be determined at trial.

WHEREFORE, the Sponsor is entitled to judgment on behalf of the Co-op against Lilien and Kafadar jointly and severally in the amount of all damages resulting from their respective wrongdoing in an amount to be determined at trial and granting such other relief as may be just and proper.

Dated: New York, NY
January 30, 2003

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