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

PRESENT: EMILY JANE GOODMAN PART 17

Justice

Feider

-v-

Amalgamated

INDEX NO. 111506-07

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided per attached

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 9/9/09

EMILY JANE GOODMAN J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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ARTHUR S. LEIDER,

Plaintiff, Index No. 111506/07

-against-

AMALGAMATED DWELLINGS, INC., ABRAHAM BRAGIN, individually and as a member of the Board of Directors of Amalgamated Dwellings, Inc., ZENA COHEN, individually and as a member of the Board of Directors of Amalgamated Dwellings, Inc., AZRIEL SIFF, individually and as a member of the Board of Directors of Amalgamated Dwellings, Inc., and JOHN DOES #1 through #10, individually and as members of the Board of Directors of Amalgamated Dwellings, Inc.,

Defendant.

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EMILY JANE GOODMAN, J.S.C.:

The instant action involves, primarily, a dispute in respect of the ownership rights and interests in the shares of stock and the related proprietary lease of an apartment in a residential cooperative building. Plaintiff Arthur Leider seeks, among other things, an order of this court (1) declaring that he is the sole owner of the shares of stock of the apartment in the building owned by defendant Amalgamated Dwellings, Inc., a cooperative housing corporation (Amalgamated); and (2) granting him summary judgment against Amalgamated, as well as certain individual defendants who are/were members of the board of directors of Amalgamated (the Board), including Abraham Bragin (Bragin), Zena Cohen (Cohen), Azriel Siff (Siff) and others, on the issue of

liability arising from the defendants' alleged breaches of fiduciary duty, and the covenant of good faith and fair dealing.

In their cross motion, the individual defendants who are/were members of the Board of Amalgamated seek an order, pursuant to CPLR 3211 (a) (7), dismissing the complaint as filed against them. In addition, the corporate defendant Amalgamated seeks leave of this court to further amend its answer to assert two additional counterclaims against the plaintiff.

For the reasons set forth herein, the various reliefs sought in plaintiff's motion are granted in part and denied in part; the relief sought in the cross motion of the individual defendants is granted, except as to defendant Bragin; and the relief sought by Amalgamated is denied.

Background

Amalgamated is the owner of a residential cooperative apartment building located at 541 Grand Street, New York, New York. Leider Affidavit, ¶ 3.[1] Plaintiff's mother, Evelyn Leider, was a shareholder of Amalgamated residing in apartment H-21 (the Apartment) since at least 1965, and plaintiff allegedly had resided with his mother at the Apartment for a substantial portion of his life. *Id.* On April 15, 1997, an entry was made in Amalgamated's registry that "Evelyn Leider & Arthur Leider"

[1] Affidavit of Arthur S. Leider in support of motion for summary judgment, sworn to on February 15, 2008.

were "tenants with rights of survivorship," and the registry was signed by Cohen, as an officer of Amalgamated. *Id.*, Exhibit 3. On or about May 24, 1997, Evelyn Leider died while she was a patient in a hospital. Bragin Affidavit, ¶ 14.[2]

Amalgamated and three neighborhood housing corporations (Hillman, East River and Seward Park) were, at one time, private Limited Dividend Housing Corporations, which meant that these corporations had the right to purchase, at par value, the shares of a deceased shareholder. Bragin Affidavit, ¶¶ 16-17. The four corporations were once jointly managed by Harold Jacob (Jacob) and his sister Judi Goldman (Goldman). *Id.*, ¶ 17. Starting in 1995, many of Amalgamated's shareholders wanted to change its status as a Limited Dividend Housing Corporation such that they could sell their stock at market prices, but the shareholders of the other three corporations (supported by Jacob, who lived at Hillman and was its vice-president) opposed free market pricing and wanted to implement caps on the amount a shareholder could receive upon a sale of stock; both schemes would result in a windfall to the shareholders. *Id.*, ¶ 20. In October 1997, the shareholders of Amalgamated voted in favor of its plan of reconstitution and implemented the free market pricing scheme. As a result, the common management of the four corporations

[2] Affidavit of Abraham Bragin, dated April 8, 2008, in opposition to plaintiff's motion for summary judgment.

ended, and Jacob was no longer the managing agent of Amalgamated. *Id.*, ¶ 46. Lawrence Properties was then retained by Amalgamated as its managing agent in or about 1998. *Id.*, ¶¶ 47, 48.

In early 1999, plaintiff claimed he was unable to locate the stock certificate and the proprietary lease for the Apartment, and he instructed his sister, Gail Weintraub, to whom he had granted a limited power of attorney, to seek a replacement certificate and lease from Amalgamated. Leider Affidavit, ¶ 7. Plaintiff's sister was required to sign an affidavit, on behalf of plaintiff, agreeing to indemnify Amalgamated in connection with the loss of the certificate and the lease (the Indemnity Agreement). Leider Affidavit, Exhibit 9. On February 24, 1999, Amalgamated issued a new stock certificate and a new lease naming plaintiff as the sole stockholder and lessee of the Apartment. Leider Affidavit, Exhibits 1 and 2. The stock certificate was signed by Bragin and Cohen (as officers of Amalgamated), and the proprietary lease was signed by Bragin (as vice-president of Amalgamated) and by Gail Weintraub (as attorney in fact for plaintiff). *Id.*

From and after Evelyn Leider's death in 1997, for the next nine to ten years, plaintiff paid maintenance charges for the Apartment to Amalgamated, as well as additional assessments that were imposed pursuant to Amalgamated's bylaws, because he was then subletting the Apartment to third-party subtenants, with the

approval of the Board. Leider Affidavit, ¶¶ 11-12. In May 2006, plaintiff was invited to Amalgamated's annual shareholders' meeting. *Id.*, ¶ 15. At the meeting, plaintiff met with Bragin and Isadore Schneider (a director of Amalgamated), and "neither mentioned that there might be a dispute regarding [plaintiff's] shareholder status." *Id.* However, it is alleged that Bragin mentioned at the meeting that he was unhappy with certain family members of plaintiff who served on the board of directors of Hillman, which had been embroiled in litigation with Amalgamated over an easement, and Amalgamated lost the lawsuit. *Id.* According to plaintiff, his "family association with Hillman is the impetus for Bragin's and Schneider's [subsequent] animus towards [him] and [their] attempt to deprive [him] of [his] property rights [in the Apartment]." *Id.*

According to Bragin, however, because plaintiff was living in California and enjoyed a "blanket of anonymity," he was unknown to the Board before the meeting, and that after the meeting, the Board "searched the corporate records and determined that Mr. Leider had wrongfully acquired the stock to his mother's apartment, which rights should have been extinguished at the time of her death in May 1997." Bragin Affidavit, ¶¶ 49-50. More specifically, Bragin alleges, inter alia, that "[p]ursuant to a pre-arranged plan and conspiracy, and through the use of various misrepresentations and other deceitful devices, the plaintiff

together with his sisters Hedy Weinberger and Gale Weintraub who reside at Hillman, Harold Jacob and Judi Goldman acting in concert assisted the plaintiff to acquire his mother's stock." *Id.*, ¶ 30. In addition, Bragin alleges that, notwithstanding Amalgamated's house rules and the Private Housing Finance Law applicable to Amalgamated, which prohibited plaintiff from becoming a co-owner with his mother (since he did not reside with her two years prior to her death and did not have her permission to add his name to the stock certificate), Jacob and Goldman, as the managing and stock-transfer agents of Amalgamated and knew of these prohibitions, "falsely lead two [Board] directors to believe that Arthur Leider was entitled to be added to his mother's stock certificate and arranged for [Cohen and Siff] to sign the necessary documents to add Arthur Leider's name to the stock for Apartment H-21." *Id.*, ¶¶ 27-33. Bragin also alleges, based upon information and belief, that Jacob and Goldman "in an attempt to fraudulently aid and abet Arthur Leider, prepared fraudulent documents to add Arthur Leider's name to his mother's stock for Apartment H-21," and that Cohen and Siff relied upon the fraudulent documents and misrepresentations when they signed Amalgamated's stock register. *Id.*, ¶¶ 29, 34, 37. Bragin further alleges, based on information and belief, that when plaintiff arranged with Jacob and Goldman to add his name to the stock certificate, "he and his family who resided next door at

Hillman ... knew about [Amalgamated's] plan of privatization and that he would have a valuable asset that could be sold for a free market price as opposed to having his mother's estate redeem the stock at par value." *Id.*, ¶ 43. According to Bragin, had Amalgamated known of the "illegal and fraudulent attempt by Plaintiff to acquire the stock and lease, it would never had approved of the transaction and would have purchased the stock upon his mother's demise." *Id.*, ¶ 53. Thus, Bragin argues that plaintiff should be compelled to pay to Evelyn Leider's estate an amount equal to the then par value of the stock, and to transfer his right and interest in the Apartment's stock certificate and related proprietary lease back to Amalgamated. *Id.*, ¶¶ 53-54. Plaintiff rejects Bragin's allegations, and points to the fact that Bragin qualified most of his allegations as based upon information and belief, as opposed to personal knowledge.

In February 2007, plaintiff submitted an application to the Board seeking its approval of a new sublease, after plaintiff's former subtenants ended their sublease and vacated the Apartment. Leider Affidavit, ¶ 16. Four months after plaintiff's submission of the application, Amalgamated's counsel asked him to show his ownership rights in the Apartment. *Id.*, ¶ 17; Exhibit 11. Even though plaintiff sent copies of the stock certificate and the lease showing that he is a registered shareholder and lessee, neither the Board nor Amalgamated's counsel acknowledged his

ownership, nor did they respond to his outstanding sublease application. *Id.*, ¶ 20. In or about July 2007, plaintiff allegedly procured prospective buyers for the Apartment; however, after they learned of the Board's refusal to consider the sublease application and the dispute over plaintiff's rights in the Apartment, the buyers withdrew their purchase commitments. Id., ¶ 21; Exhibit 14. Plaintiff asserts that the foregoing "inexcusable conduct" of the Board (i.e., repudiation of his rights in the Apartment, which led to his inability to sublet or sell the Apartment, and his liability to pay maintenance charges despite Amalgamated's impairment of his rights) has caused him to suffer economic damages. *Id.*, ¶ 25. Hence, plaintiff commenced this action seeking redress for the damages he allegedly suffered as a result of the Board's and Amalgamated's alleged misconduct.

Applicable Legal Standards

In stating the standards for granting or denying a summary judgment motion pursuant to CPLR 3212, the Court of Appeals noted in *Alvarez v Prospect Hospital* (68 NY2d 320, 324 [1986]):

> As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such ... showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary support in admissible form sufficient to establish the existence of material

> issues of fact which require a trial of the action [internal citations omitted].

Adhering to the Court of Appeals' guidance, the lower courts uniformly scrutinize motions for summary judgment, as well as the facts and circumstances of each case, to determine whether relief should be granted or denied. *Giandana v Providence Rest Nursing Home*, 32 AD3d 126, 148 (1st Dept 2006)(because summary judgment "deprives the litigant of his day in court, it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues")(citations omitted), *revd on other grounds* 8 NY3d 859 (2007); *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997)(in considering a summary judgment motion, "evidence should be analyzed in the light most favorable to the party opposing the motion")(citations omitted). However, general allegations of a conclusory nature not supported by competent evidence are insufficient to defeat a motion for summary judgment. *Alvarez*, 68 NY2d at 324-325.

Moreover, to prevail on a motion to dismiss based on documentary evidence, the documents relied upon by the movant must resolve all factual issues as a matter of law. *Weiss v Cuddy & Feder*, 200 AD2d 665, 667 (2nd Dept 1994). Furthermore, "[w]hen the moving party [seeks dismissal and] offers evidentiary material, the court is required to determine whether the proponent of the [pleading] has a cause of action, not whether he or she has stated one." *Asgahar v Tringali Realty, Inc.*, 18 AD3d

408, 409 (2nd Dept 2005).

Ownership Rights In The Shares Of Stock And Proprietary Lease

In support of his motion for a declaratory judgment that he is the sole and rightful owner of the shares of stock and the lease appurtenant to the Apartment (the Fourth Cause of Action), plaintiff has submitted, as documentary evidence, copies of the stock certificate, the lease and Amalgamated's stock registry. Leider Affidavit, Exhibits 1, 2 and 3. The authenticity of these documents is undisputed. However, defendants argue that plaintiff, with the help of certain individuals who are non-parties to this action (including his sisters, as well as Jacob and Goldman, who were the managing and stock transfer agents of Amalgamated during the relevant time), illegally and fraudulently procured ownership of the stock certificate and the lease through fraud, conspiracy and misrepresentations.

According to defendants, the illicit conduct was allegedly committed by plaintiff and his alleged co-conspirators starting in 1997, when plaintiff's name was added to Amalgamated's stock registry, and continued through 1999, when Amalgamated issued to plaintiff the new stock certificate and new proprietary lease. Among other things, defendants allege that Jacob and Goldman, "in an attempt to fraudulently aid and abet Arthur Leider, prepared fraudulent documents to add Arthur Leider's name to his mother's stock for Apartment H-21," and that defendants Cohen and Siff

relied upon the fraudulent documents and misrepresentations when they signed the stock register, the new stock certificate and other documents. Bragin Affidavit, ¶¶ 29, 33-37.[3] However, the allegation is based "upon information and belief," and defendants have not identified the "fraudulent documents" prepared by Jacob and Goldman. Although the allegation of a global conspiracy is conclusory and unsupported, it is notable that plaintiff has not denied defendants' allegation that plaintiff was a resident of California during the relevant time periods, and therefore, was not entitled to be listed as a tenant with rights of survivorship in 1997, nor entitled to ownership of the Apartment in 1999. A further question is raised based on plaintiff's unexplained need to grant his sister a limited power of attorney to execute documents in 1999, in order to obtain a new stock certificate, in lieu of executing those documents himself.[4]

However, plaintiff correctly argues that, because the

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[3] Bragin was a Board member and an attorney during all relevant times, and he was also a signatory to the new stock certificate and the new lease. However, he does not argue that he was unfamiliar with the stock transfer restrictions under the house rules of Amalgamated and Private Housing Finance Law, which purportedly would have prevented issuance of the new certificate and lease to plaintiff.

[4] As defendants correctly note, discovery is necessary with respect to whether Bragin resided with his mother for the requisite period, but not for the reason defendants state. The issue is relevant, among other things, to defendants' defense to the bad faith claim asserted against them. The parties, however, are encouraged to settle this action before the preliminary conference scheduled for October 1, 2009.

alleged fraud ended in 1999, the fraud claim is barred by the six-year statute of limitations under CPLR 213 (8), as the claim was not asserted by defendants (as a defense) until 2008. Defendants contend that the Board did not recognize who plaintiff was at the 2006 meeting of shareholders, until they "searched the corporate records" thereafter. Bragin Affidavit, ¶ 50. Thus, defendants argue that the fraud claim is entitled to be treated under the discovery exception of CPLR 213 (8),[5] as the Board only discovered after May 2006 that plaintiff had "fraudulently acquired his mother's interests" in the stock and the lease to the Apartment. *Id.*, ¶¶ 50-51. Defendants also argue that in April 1997, Amalgamated "was relying on the integrity of its former managing agent [i.e., Jacob and Goldman] who aided and abetted the plaintiff in adding his name to [the] stock certificate," and that defendants "had no reason to believe that its agent at the time was untrustworthy." Defendants' Memorandum of Law in Further Support of Cross-Motion to Dismiss Complaint (Defendants' Reply Brief), at 5. Hence, defendants argue that there is an issue of fact as to whether Amalgamated was "aware of enough operative facts so that with reasonable diligence it could have discovered the fraud within the time periods provided by

[5] The statute provides, in part, that for an action based on fraud, the time within which the claimant must commence an action is "the greater of six years from the date the cause of action accrued or two years from the time the [claimant] discovered the fraud, or could with reasonable diligence have discovered it."

CPLR 213 (8)." *Id.*

Defendants' arguments are not convincing. First, as noted above, the allegation that Jacob and Goldman aided and abetted plaintiff in the alleged fraud is conclusory. Also, defendants have not identified the "corporate records" that were searched by the Board after the 2006 shareholders' meeting, in reaching its determination that plaintiff fraudulently acquired his mother's interests in the stock and lease. Because defendants are seeking the benefit of the "discovery exception" under CPLR 213 (8) (i.e., two years to bring a fraud claim after discovery), they have "[t]he burden of establishing that the fraud could not have been discovered prior to the two-year period." *Von Blomberg v Garis*, 44 AD3d 1033, 1034 (2d Dept 2007).

Moreover, it has been generally held that when the documents necessary for a claimant to discover the alleged fraud were in his possession, the discovery exception does not apply. *See Spinale v Tag's Pride Produce Corp.*, 44 AD3d 570, 571 (1st Dept 2007); *see also Rite Aid Corp. v Grass*, 48 AD3d 363, 364 (1st Dept 2008) (fraud claim dismissed because claimant had notice of "operative facts that should have prompted further inquiry," and documents relating to the alleged fraud had been in claimant's possession). Here, defendants do not (and cannot) argue that the "corporate records" they relied on in determining or discovering the alleged fraud had not been in their possession. Instead,

they argue that "mere suspicion will not constitute sufficient substitute for knowledge of fraud," as the new agent hired to replace Jacob and Goldman (i.e., Lawrence Properties) relied on the stock registry in issuing the new stock certificates and leases, and "did not even have a whiff of suspicion." Defendants' Reply Brief, at 5. This argument is unpersuasive. When compared with the new agent, defendants were more familiar with the historical information of Amalgamated and its shareholders as well as its house rules, and thus were in a better position to discover the alleged fraud. Defendants cannot use the new agent as an excuse for their own failure in exercising reasonable diligence to discover the alleged fraud. In light of the foregoing, and inasmuch as it is alleged that plaintiff and his co-conspirators perpetrated the fraud from 1997 to 1999 (as asserted in the Bragin Affidavit), defendants had sufficient notice of the operative facts that should have required further inquiry and diligence. Yet, they failed to act promptly and diligently. Thus, even assuming, arguendo, that defendants have adequately pled the fraud claim as a defense, the claim is barred by the statute of limitations under CPLR 213 (8).

Accordingly, summary judgment should be granted in favor of plaintiff with respect to his request for a declaratory judgment (the Fourth Cause of Action) that he is the sole owner of the stock certificate and the lease appurtenant to the Apartment.

Amalgamated's Counterclaims

In its amended answer, Amalgamated asserts a counterclaim against plaintiff based on the Indemnity Agreement, which relates to plaintiff's loss of the original lease and stock certificate. Amalgamated argues that, because it incurred costs and expenses in defending this action, plaintiff is required to indemnify Amalgamated pursuant to the Indemnity Agreement. Notably, in their legal briefs, defendants did not address or respond to plaintiff's request for dismissal of this counterclaim.

The Indemnity Agreement provides, in relevant part, that plaintiff agrees to indemnify Amalgamated for claims and losses "arising from the assertion of any party whatsoever of any claim for payment based on such party's possession of the proprietary lease and stock certificate." Indemnity Agreement, ¶ 2. Also, pursuant to the Indemnity Agreement, plaintiff "agrees to deliver the [lost] lease and stock certificate" to Amalgamated "if same shall ever be found." *Id.*, ¶ 3.[6] A logical construction and interpretation of the foregoing provisions lead to the following conclusion: if a third party (or even if the party is plaintiff) is in possession of the *lost* certificate and lease, and such party asserts claims for payment against Amalgamated based on these documents, plaintiff is required to indemnify Amalgamated

[6] It is undisputed that a new replacement lease and a new replacement stock certificate were issued to plaintiff after the Indemnity Agreement was executed in favor of Amalgamated.

for such claims. Here, neither a third party nor plaintiff is claiming payment against Amalgamated based upon the lost lease and certificate. Therefore, the indemnity provision is inapplicable, and this counterclaim should be dismissed.

In its cross motion, Amalgamated seeks leave of the court to further amend its answer to assert two additional counterclaims. As to additional counterclaim number 1, Amalgamated seeks an order to compel plaintiff to pay to his mother's estate an amount equal to the then par value of the shares of stock for the Apartment, and that the court should declare plaintiff's interests in the stock certificate and the lease as null and void. This counterclaim is based on the same fraud allegations (recited almost verbatim) stated in the Bragin Affidavit. Because the court has determined that plaintiff is the sole and rightful owner of the stock and lease, Amalgamated's request for leave to amend should be denied.

As to its proposed counterclaim number 2, Amalgamated seeks an accounting from plaintiff in respect of the profits he received from subletting the Apartment. Amalgamated argues that it, rather than plaintiff, should be entitled to such profits, as plaintiff had allegedly acquired title to the Apartment by fraud. For the reasons discussed above as to proposed counterclaim number 1, the leave to amend should likewise be denied as to counterclaim number 2.

Claims Against Individual Defendants (The First Cause of Action)

In the complaint, plaintiff alleges that each member of the Board owed him a "fiduciary duty with respect to all matters pertaining to Plaintiff's ownership interest in Amalgamated." Complaint, ¶ 45. He also alleges that the Board's refusal to consider and determine his sublease application, as well as its disavowal of his ownership interest in the Apartment, were undertaken in bad faith and in disregard of his shareholder rights. *Id.*, ¶ 46. He further alleges that, due to the Board's wrongful conduct, he has been unable to sublease or sell the Apartment, and has suffered economic losses. *Id.*, ¶¶ 47-50. He contends that the individual members of the Board (including Bragin, Cohen, Siff and others) have breached their fiduciary duty owed to him, and are liable to him for punitive damages. *Id.*, ¶ 51. He further contends that, as long as he is the record owner and shareholder, the Board owes him a fiduciary duty "until the Board successfully compels [a] rescission or reformation" of his ownership documents. Plaintiff's Reply Brief, at 9.

"The duty owed by a director is that of a fiduciary to a corporation and to its shareholders, collectively, and the courts are generally prohibited by the business judgment rule from inquiring into the propriety of actions taken by the directors on its behalf." *Konrad v 136 East 64 Street Corp.*, 246 AD2d 324, 325 (1st Dept 1998). The Court of Appeals has elaborated that,

with respect to cooperative dwellings, "the business judgment rule provides that a court should defer to a cooperative board's determination '[s]o long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith.'" *40 West 67th Street v Pullman*, 100 NY2d 147, 152 (2003) (internal citations omitted).

In this case, there is no allegation that the conduct of the Board (or its members) was outside its scope of authority, nor is there evidence that the alleged conduct did not further corporate purpose. Instead, plaintiff alleges that the Board's refusal to consider his sublease application, and its disavowal of his shareholder rights, were undertaken in bad faith. Plaintiff relies primarily on *Biondi v Beekman Hill House Apartment Corp.* (92 NY2d 659 [2000]) for the proposition that the directors of a cooperative can be held personally liable for breach of fiduciary duty, if they wrongfully denied a shareholder's sublet application, and that they are not entitled to be indemnified pursuant to the cooperative's bylaws. Plaintiff's Reply Brief, at 13. Plaintiff also alleges that he had informed Amalgamated's counsel that "the Board's refusal to consider [his sublease] application might expose Amalgamated shareholders ... to liability," as one of his proposed subtenants was "a member of a protected class." Leider Affidavit, ¶ 19.

Plaintiff's reliance on *Biondi* is misplaced. In that case,

the jury found that the corporate defendant and the individual defendants, including Biondi in his official capacity as a board member, violated federal housing laws when they discriminated against a proposed subtenant who was African-American. Also, the court found that there was evidence to support the shareholder's claim that the board members acted in bad faith, and with a purpose that was not in the best interest of the cooperative, when they denied her sublet application and issued a notice of default against her for "objectionable conduct," arising from her accusation of racism against the board and Biondi. *Id.* at 662. In this case, however, there is no evidence that the Board's refusal to consider the sublease application was based on racial discrimination. Indeed, plaintiff states that he believes his "family's association with Hillman is the impetus for Bragin's and Schneider's animus towards [him] and attempt to deprive [him] of [his] property rights." Leider Affidavit, ¶ 15.[7] In such regard, *Biondi* is distinguishable and inapplicable.

Notably, most of plaintiff's allegations of bad faith and breach of fiduciary duty were directed at the Board, as a whole. It has been held that, even though board members of a cooperative may have taken action that "deliberately singles out individuals for harmful treatment," such action does not "ipso facto, expose

[7] Plaintiff has withdrawn his motion seeking a default judgment against Isadore Schneider because she is not a member of the board of directors.

the individual board members to liability." *Konrad v 136 East 64 Street Corp.*, 246 AD2d at 326 (internal quotation marks and citations omitted). The Court explained that "individual directors and officers may not be subject to liability absent the allegation that they committed separate tortious acts." *Id.* (citations omitted); *Hoppe v The Board of Directors of The 51-78 Owners Corp.*, 49 AD3d 477, 477 (1st Dept 2008) (same); *Pelton v 77 Park Ave. Condominium*, 38 AD3d 1, 10 (1st Dept 2006) (same). Because plaintiff has not alleged separate tortious acts by the Board members (except for Bragin, as discussed below), the breach of fiduciary duty claim against such members should be dismissed.[8] *Konrad*, 246 AD2d at 326 (because "proposed cause of action ascribes no independent tortious conduct to any individual director," it is "deficient as a matter of law").

Plaintiff states that Bragin refused to recognize the very documents Bragin had executed, yet never attempted to rescind, because he was unhappy with certain family members of plaintiff, who served on the board of directors of Hillman, which had been embroiled in litigation with Amalgamated over an easement. Leider Affidavit ¶15. However, Bragin contends that he did not act in bad faith because he was tricked by Jacobs and Goldman when he signed the corporate documents, and that plaintiff was

[8] For this reason, plaintiff's motion for a default judgment against director Lyn Kest, sued as a John Doe, is denied and the cross motion to dismiss is granted for that reason.

ineligible, under Amalgamated's rules and the Private Housing Finance Law, to have his name added to these documents. Bragin Affidavit, ¶¶ 26-28. Thus, because there is an issue of fact as to whether Bragin's animus towards plaintiff's family caused Bragin to refuse to recognize the documents he had executed, in an attempt to deprive plaintiff of his property rights, plaintiff's motion for summary judgment against defendant Bragin is denied.

Claims Against Amalgamated (The Second and Third Causes of Action)

The Second Cause of Action alleges that Amalgamated was negligent in maintaining its books and records, which, if properly maintained, would reflect plaintiff's ownership interest in the stock certificate and lease. Complaint, ¶ 53. The Second Cause of Action should be dismissed because there is no evidence to support the allegation that Amalgamated was negligent in maintaining its books and records. In fact, the books and records of Amalgamated reflect that plaintiff is the registered holder of the stock certificate and the lease.

The Third Cause of Action alleges that Amalgamated breached its duty of good faith and fair dealing in connection with plaintiff's interest in the proprietary lease. Complaint, ¶¶ 56-57. More specifically, plaintiff argues that, as a record shareholder of Amalgamated, he was entitled to have his sublease

application considered by the Board, but the Board refused to do so, which caused him economic losses. He argues that Amalgamated's conduct was undertaken in bad faith based on animus, and violated the covenant of good faith and fair dealing. Plaintiff's Brief, at 6. However, Amalgamated maintains that it refused to consider the sublet application because it took the position that plaintiff was not entitled to own the Apartment. Accordingly, an issue of fact exists as to whether the Board members (as a whole and on behalf of Amalgamated) acted in bad faith when they refused to act on the sublet application.[9] Therefore, the motion for summary judgment against Amalgamated for its alleged breach of the covenant of good faith and fair dealing is denied.

Attorneys' Fees Claim (The Sixth Cause of Action)

Plaintiff seeks attorneys' fees pursuant to Real Property Law § 234, as the prevailing party. Because other causes of action remain, the request is denied as premature.

Accordingly, it is

ORDERED that the part of plaintiff's motion (the First Cause of Action - breach of fiduciary duty) seeking summary judgment

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[9]Amalgamated also asserts the defense that the proprietary lease states that "there shall be no limitation on the right of the Board of Directors to grant or withhold consent, for any reason or for no reason, to any proposed subletting." Proprietary Lease, ¶ 9; Amended Answer, Affirmative Defenses, ¶ 4.

against the individual members of the board of directors of Amalgamated, is denied and the cross motion for dismissal of the complaint against the individual defendants and the other board members sued as "John Doe" is granted, except with respect to defendant Abraham Bragin; and it is further

ORDERED that the part of plaintiff's motion for summary judgment on the Second Cause of Action (negligence claim against Amalgamated) is denied and the Second Cause of Action is dismissed; and it is further

ORDERED that the part of plaintiff's motion for summary judgment against Amalgamated (the Third Cause of Action - breach of the covenant of good faith and fair dealing) is denied; and it is further

ORDERED that the Fifth Cause of Action (mandatory injunctive relief against the individual defendants regarding the sublease) is deemed withdrawn by plaintiff, as plaintiff acknowledged in his reply brief that the relief sought is now moot; and it is further

ORDERED that the part of plaintiff's motion for summary judgment on the Sixth Cause of Action (attorneys' fees claim against Amalgamated) is denied; and it is further

ORDERED that defendants' cross motion seeking leave of court to further amend their answer to add two proposed counterclaims against plaintiff is denied; and it is further

ORDERED that the Clerk of the Court is directed to sever the causes of action asserted against Zena Cohen and Azriel Siff and enter judgment in favor of those two defendants dismissing plaintiff's complaint, with costs and disbursements, as taxed by the Court; and it is further

ORDERED that the Clerk of the Court is directed to sever the Fourth Cause of Action for a declaratory judgment from the action; and it is further

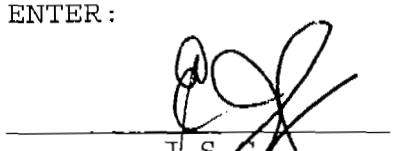
ADJUDGED AND DECLARED that plaintiff is the sole owner of the shares of stock and the proprietary lease appurtenant to the Apartment; and it is further

ORDERED that a preliminary conference is scheduled in Part 17, Room 422 on October 1, 2009.

This constitutes the Decision and Order of the Court.

Dated: September 9, 2009

ENTER:



J. S. C.

EMILY JANE GOODMAN