CASE NOTES

Unhappy Shareholders Cannot Sue Willy-Nilly

BY DALE J. DEGENSHEIN

OWNERS OF COOPERATIVE and condominium apartments have the right to bring derivative actions against their boards. Simply put, derivative actions allow a shareholder to sue on behalf of a corporation. But under what circumstances and with what notice? That is one issue addressed in a recent decision, *Avramides v. Moussa*.

Michael Avramides owned a co-op apartment at 319 East 50th Street. He began an action "derivatively" on behalf of the cooperative, alleging that the individual board members were responsible for improper repairs to the roof and terraces of the building. (There had been prior lawsuits involving Avramides and the co-op.)

The case raises an important aspect of derivative actions. In a co-op, as in all corporations, a derivative action is a creature of statute. The statute allows a shareholder to start a lawsuit, but he or she has to give the board an opportunity to begin an action itself. The shareholder has to tell the board, in effect, "This is what is wrong, and if you don't take steps, I will."

If, however, the shareholder believes that to ask the board to start the action would be futile (meaning, essentially, that the board members realize they are in the wrong), the shareholder does not need to first alert the board but must explain to the court why he or she did not initially ask the board to take action.

In this case, the lower court found that Avramides had not shown that the individual defendants – all directors – lacked independence or had a personal stake in the substance of the suit. The appellate court concurred. Another issue addressed was the potential culpability of individual board members, acting in their official capacity. The lower court found that the complaint failed to state a solid claim against any of the individual directors, separate from their collective action on behalf of the cooperative. Accordingly, those claims were dismissed as well.

The appellate court took it a step further. Avramides argued that a 2012 appellate case, *Fletcher v. Dakota Inc.*, superseded and changed the cases relied on by the lower court – that in light of *Fletcher*, there is no "safe harbor from judicial inquiry for directors who are alleged to have engaged in conduct not protected by the Business Judgment Rule." The appellate court discussed that, in *Fletcher*, the directors allegedly discriminated against the plaintiff based on race. In *Avramides,* however, the actions taken by the board were protected by the Business Judgment Rule.

Reading the Ruling

If a shareholder or unit-owner is so dissatisfied with the way a board is acting, a derivative action is one way to deal with the situation. However, as this case reminds us, the claim cannot be brought willy-nilly. The apartment owner must ask the board to act or must prove that the board was corrupt.

Courts have been attempting to determine *Fletcher*'s true scope ever since it was decided in 2012. In effect, *Fletcher* said that board members were not protected by their position if they acted improperly. In *Avramides*, the board's actions – repairs to the roof and terraces – were within its business judgment, and there was no basis to hold any individual liable. In *Stinner v. Epstein*, another case decided by another appellate court at about the same time as *Avramides,* the court found that allegations that a board member had improperly received a $25,000 payment was enough to allow a claim against that member to proceed.

It seems that the facts in *Avramides* and *Stinner* lie at opposite ends of the spectrum. In the former, the board did not breach its duty and thus no individual could be held accountable; in the latter, the allegation that the board member did something in his own interest to the detriment of the building was sufficient to allow the court to deny a motion to dismiss the complaint. ■

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