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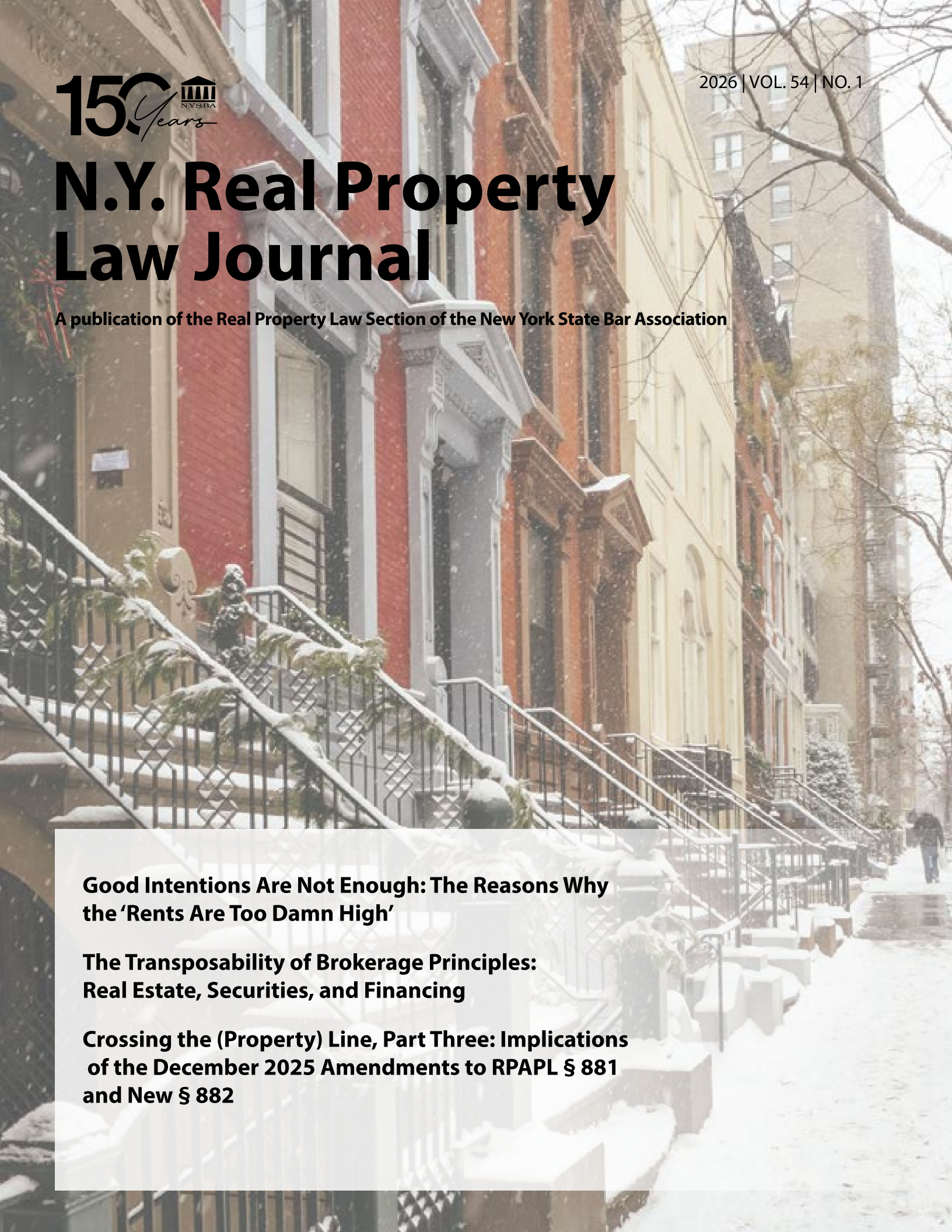

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BILL'S COOP/CONDO CORNER
Fiduciary Duties of a Co-op: Who Is Responsible?

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Who owes fiduciary duties in a cooperative apartment corporation?

You would think that this would be an easy question to answer, at least for someone like me who advises co-op boards every day.

If you follow the courts, however, you will see that judges will give very different answers – sometimes it's the corporation that owes fiduciary duties, sometimes it's the board of directors, and sometimes it's the individual directors; sometimes it's all three.[1] In some cases, the courts casually move among the three, as if it makes no difference to the analysis,[2] but other times the courts treat the question of whether the "board" or the "directors" owe fiduciary duties to be fundamental and dispositive.[3]

In all of this murkiness,[4] a line of cases has developed, seemingly almost by accident, that if taken to an extreme would effectively insulate co-op directors from most, if not all, liability for breaches of fiduciary duties. According to some courts, there can be no breach of fiduciary duty where there is "**no allegation of individual wrongdoing by board members separate and apart from their collective actions taken on behalf of the cooperative.**"[5] We will discuss this in greater detail below, but more analysis will not alter what is immediately apparent – this "separate and apart" formulation is vague and ambiguous and thus lends itself to at least two very different interpretations.

Before we can get to that line of cases, and discuss what courts might do to address the complications that have arisen from it, we should first review how courts have treated the basic issue of who owes fiduciary duties in a co-op.

Many courts have held that the corporation itself owes fiduciary duties. In *Smolinsky v. 46 Rampasture Owners, Inc.*, for example, this Court found that "**a cooperative corporation has a fiduciary duty** to treat its shareholders fairly and evenly, and must discharge that duty with good faith and scrupulous honesty."[6] It is characteristic of many of the decisions discussed here that there is no deep analysis in *Smolinsky* about whether the duty owed was really by the corporation or by someone else, and part of the challenge in this area is that relatively few courts have ever considered the question to be consequential enough to analyze in depth.[7] Nevertheless, of all of the conclusions to be drawn here, we can be most confident that where courts have considered the topic at all, they have mostly rejected the notion that the corporation itself owes fiduciary duties.[8]

Many courts have held that the board of directors owes fiduciary duties. Many courts have held that it is the board of directors of a co-op that owes fiduciary duties. For example, in ruling on a breach of fiduciary duty claim, one court stated that "[f]or present purposes, we need not, nor should we determine the entire range of **the fiduciary obligations of a cooperative board**, other than to note that **the board owes its duty of loyalty to the cooperative** – that is, it must act for the benefit of the residents collectively." Do you recognize that passage? It's none other than the lead in to the Court of Appeals' articulation of the business judgment rule applied to co-ops in *Levandusky v. One Fifth Ave. Apartment Corp*.[9]

In many cases, the description of the fiduciary duty obligation as lying with the board of directors often seems more rhetorical than analytical, as if the "board" is merely shorthand for "each of the individual members of the board of directors."[10] Nevertheless, this formulation of the fiduciary duty has caused problems, because if a "board" owes duties, shouldn't it follow that a "board" can be sued for breaching those duties?[11]

This exact question recently presented itself in *Tahari v. 860 Fifth Avenue Corporation*, in which the Appellate Division, First Department refused to allow the plaintiff to pursue a breach of fiduciary duty claim against a board of

directors, because "a board of directors is not an entity that may [be?] sued separately from a corporation."

The *Tahari* decision arose from a lawsuit filed in 2018 asserting a number of different claims, including a breach of fiduciary duty claim against the corporation and each of the board members. In 2023, the Appellate Division affirmed dismissal of that claim against the corporation and all but two of the directors.[12]

In response to this setback, the plaintiff sought to amend his pleading to assert a fiduciary duty claim against the board of directors as an entity rather than against the corporation. The Appellate Division then affirmed dismissal of this revised claim, noting, among other things, that a board does not own property in its own name and so seeking a judgment against the board "would be, for all practical purposes, pointless."[13]

The directors each owe fiduciary duties. Notwithstanding all of the cases cited above, it is fair to say that the general consensus today is that fiduciary duties are owed by each of the individual directors in a co-op. However, that consensus does not extend to the types of allegations that will expose individual directors to liability for breaches of fiduciary duty.

It is generally held that allegations of breach of fiduciary duty must be supported by specific, non-conclusory allegations of tortious conduct by individual directors.[14] In the co-op context, that means that it is not enough to allege that "the co-op did this" or "the board did that," but rather a plaintiff must specifically identify what each accused director did, and why and how they breached their duty of care or duty of loyalty.

We could call this the vicarious liability or "guilt by association" rule, in that it "protects individual board members who did not participate or aid and abet the tortfeasors from being held vicariously liable for the tortfeasors' action."[15] In other words, if all but one director had a conflict of interest or failed to exercise due care, the one remaining director cannot be held liable for breach of fiduciary duty solely based on the way the rest of the board voted.

According to some courts, however – and here we arrive at the curious line of cases we teased at the beginning of the article – the bar for individual director liability is even higher. This line of cases holds that that there can be no breach of fiduciary duty "where there is no allegation of individual wrongdoing by the members **separate and apart from their collective actions taken on behalf of the cooperative**," using that formulation to effectively immunize board members from fiduciary duty liability for any actions taken **as a board**.[16]

In the *Hersh* case, for example, the Appellate Division, First Department applied this "director immunity" rule to dismiss a complaint that had contained page after page of fact-specific, detailed allegations of the individual defendants acting in bad faith, showing favoritism to fellow board members, and ignoring the advice of the co-op's advisers for their own personal self-interest.[17] Because these alleged breaches were manifest **in board votes**, however, the court decided that these actions were not actionable as a matter of law.

In *Jarmuth v. Leonard*, the plaintiff had made detailed and particularized allegations of disparate treatment and improper conduct against five individual directors of a co-op who, for self-interested reasons, had denied plaintiff the right to purchase an apartment.[18] Based on the specificity of these allegations, there was no possibility that any of the accused board members could be at risk of mere "guilt by association." Nevertheless, the First Department dismissed the fiduciary duty claim because the complaint "fail[ed] to allege that defendants, the individual members of the cooperative's board of directors, acted tortiously **other than in their capacity as board members**, and, as a result, fails to state a cognizable claim against them."[19] In other words, the claims were defective not because they were not detailed enough, but because all of the allegations related to their conduct "as board members."[20]

Suffice it to say, if the rule in New York is that co-op board members cannot be held liable for breach of fiduciary duty for actions undertaken "in their capacity as board members," then almost by definition, vanishingly few directors will ever face the possibility of being held liable for breach of fiduciary duty.

What confuses matters further is that there is no way to predict whether a court will apply a "guilt by association" analysis or a "director immunity" analysis, even when the courts use the exact same language. The "separate and apart" formulation at issue seems to have originated in *Pelton v. 77 Park Ave. Condo*, a 2006 case in which the Appellate Division, First Department affirmed dismissal of a fiduciary duty claim for being inadequately pleaded.[21] Despite *Pelton* later being overruled by the same court, its declaration that fiduciary duty claims require allegations of wrongdoing "separate and apart from the actions taken by the board members collectively" has survived and been adopted by dozens of different courts over the years. But sometimes the courts will choose to follow that sentence by applying the "guilt by association" rule, and other times the court will choose instead to apply the "director immunity rule."

This choice will be dispositive in many cases. For example, in the *Tahari* litigation discussed above, the court quot-

ed the "separate and apart" language in dismissing most of the individual board defendants, but sustained the claim as against two of the directors because the complaint had sufficiently pleaded that those two individuals "had a bad faith motivation for their refusal to approve plaintiff's project, basing their refusal on the impacts to their own apartment rather than on any benefit to the cooperative as a whole."[22] In dismissing the claims against the rest of the directors that had not been so accused, the court was applying the "guilt by association" rule. If the court had instead applied a "director immunity" theory, those two remaining defendants would have been dismissed from the case as well.

At the present time, all of these different formulations and standards seem to coexist with little recognition of the inconsistencies in doctrine, much less an effort to harmonize or resolve the pleading rules.[23] It does not appear that any appellate court has ever squarely analyzed whether breach of fiduciary duty claims should be subject to what we have termed the "guilt by association" rule or the "director immunity" rule in a manner similar to the way the court in *Tahari* has hopefully settled the question whether a "board of directors" owes fiduciary duties.

As a practitioner who gets asked on an almost daily basis to opine on issues relating to fiduciary duties and co-op director responsibilities, a similarly unequivocal decision clarifying what sort of conduct will expose directors to fiduciary duty liability would be a welcome development.

Endnotes

1. *See, e.g.*, *Kleinerman v. 245 E. 87 Tenants Corp.*, 74 A.D.3d 448, 449 (1st Dep't 2010) (finding that "Plaintiffs sufficiently alleged a cause of action for breach of fiduciary duty against the co-op, board, its officer and individual board members"). Please note that for simplicity of analysis, discussion in this article is largely confined to co-op boards and board members, but officers (and managing agents and attorneys) owe fiduciary duties as well. Please also note that this article does not discuss fiduciary duties in the broader corporate context in part because some of the doctrines discussed herein seem to have only arisen in litigation involving co-ops (and condos).
2. *See, e.g., Orlitsky v. 33 Greenwich Owners Corp.*, 236 A.D.3d 408, 409 (1st Dep't 2025) (sustaining a cause of action for breach of fiduciary against the corporation, and finding that discovery would be necessary to determine "whether the Board's actions were taken in good faith").
3. *See Tahari v. 860 Fifth Ave. Corp.*, --- F.3d ----, 2025 WL 2857263 (1st Dep't Oct. 9, 2025), discussed below.
4. Note that the question of to whom a fiduciary owes duties – is it each of the shareholders, the shareholders collectively, the corporation, or all three? – is another issue in a surprising state of confusion.
5. *See Hersh v. One Fifth Ave. Apartment Corp.*, 163 A.D.3d 500, 500-01 (1st Dep't 2018).
6. 230 A.D.2d 620, 622 (1st Dep't 1996) (emphasis added); *see also Orlitsky v. 33 Greenwich Owners Corp.*, 236 A.D.3d 408, 409 (1st Dep't 2025); *Louis & Anne Abrons Found., Inc. v. 29 E. 64th St. Corp.*, 297 A.D.2d 258, 260-61 (1st Dep't 2002); *Rosenfeld v. Southgate Owners Corp.*, No. 156720/2015, 2020 WL 7977039, at *22–23 (Sup. Ct. N.Y. Co. Dec. 23, 2020); *Sherry Associates v. The Sherry-Netherland, Inc.*, No. 124479/95, 1999 WL 35137263 (Sup. Ct. N.Y. Co. Oct. 05, 1999).
7. A similar point was recently made by the court in *Stillpoint Meadows PH-62, LLC v. Residential Bd. of Managers of 62 Cooper Square Condo.*: "With respect to the existence of a fiduciary duty, the parties do not provide any appellate precedent considering whether or not a unit-owner-selected condominium board, as an entity, owes a fiduciary duty to the unit owners," which the court characterized as a "somewhat surprising … gap in New York's condominium caselaw." 85 Misc. 3d 1245(A), 229 N.Y.S.3d 905 (Sup. Ct. N.Y. Co. Mar. 13, 2025).
8. *See Avrahami v. 235 W. 108th St. Owners Corp.*, 237 A.D.3d 492, 494 (1st Dep't 2025) ("In addition, plaintiffs sued the cooperative corporation rather than any individual board member, further warranting dismissal of the [fiduciary duty] claim"); *Suber v. Churchill Owners Corp.*, 228 A.D.3d 414, 415–16 (1st Dep't 2024) ("With respect to the breach of fiduciary duty claim, the corporation itself does not owe a shareholder a fiduciary duty"); *Dau v. 16 Sutton Place Apartment Corp.*, 205 A.D.3d 533, 535–36 (1st Dep't 2022) ("The remaining allegations of breach of fiduciary duty made against the corporation must be dismissed because the corporation does not owe a fiduciary duty to its shareholders"); *Dunnegan v. 220 E. 54th St. Owners, Inc.*, 518 F. Supp. 3d 764, 772 (S.D.N.Y. 2021) ("Under New York law, a corporation does not have fiduciary duties to its shareholders"); and many more like that.
9. 75 N.Y.2d 530, 538, 553 N.E.2d 1317, 1321-22 (1990) (emphasis added). For reference, the "business judgment rule" is set out in the sentence immediately following: "So long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith, courts will not substitute their judgment for the board's. Stated somewhat differently, unless a resident challenging the board's action is able to demonstrate a breach of this duty, judicial review is not available." It is ironic that this foundational and influential rule is based in part on an arguably mistaken conception of fiduciary duty. *See Tahari*, 2025 WL 2857263, *infra*.
10. Indeed, many court decisions refer to the "board" and the "directors" interchangeably or in tandem. *See, e.g., Higgins v. 120 Riverside Boulevard at Trump Place Condo.,* No. 21-CV-4203 (LJL), 2022 WL 3920044, at *22–23 (S.D.N.Y. Aug. 31, 2022); *Mishaan v. 1035 Fifth Ave. Corp.*, 47 Misc. 3d 930, 942 (Sup. Ct. N.Y. Co. 2015) ("Like any other corporate board, the board of a residential cooperative has a fiduciary duty to the shareholders, and where violations of individual officers' and board members' fiduciary duties are alleged, a breach of fiduciary duty claim may be maintained against such individuals"); *Newman v. 911 Alwyn Owners Corp.*, 47 Misc. 3d 1213(A), 15 N.Y.S.3d 713 (Sup. Ct. N.Y. Co. 2015) (Applying these guidelines, and accepting all the plaintiffs' factual allegations as true, they fall short establishing a breach of fiduciary duty claim against the corporate board or individual members").
11. *See Buchman v. 117 E. 72nd St. Corp.*, where individual directors were able to escape liability because the fiduciary obligation supposedly laid with the "board" as a whole instead of with each of them. 80 Misc. 3d 1235(A), 198 N.Y.S.3d 500 (Sup. Ct.

N.Y. Co. 2023) (holding that "[t]he breach of fiduciary duty claim against the individual members of the cooperative's Board of Directors and Pincus, an officer of the board, fails because individual board members and officers are not personally liable for a board's breach of its fiduciary duty").

12. *See Tahari v. 860 Fifth Ave. Corp.*, 214 A.D.3d 491, 492 (1st Dep't 2023) (dismissing claims against the co-op because "because a corporation owes no fiduciary duty to its shareholders," and against all but two directors because the complaint "d[id] not allege any individual wrongdoing by the members of the board separate and apart from their collective actions taken in their capacity as board members").

13. The appellant in *Tahari* had cited more than a dozen different cases (including *Levandusky*) standing for the proposition that a board owes fiduciary duties and should therefore be a suable entity. *See* App. Br. at 21 *et seq*. (https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=PANIU944uUCmyLXQeIR5Cg==).

14. *See Stang, LLC v. Hudson Square Hotel, LLC*, 158 A.D. 446, 446-447 (1st Dep't 2018) (noting that claims for breach of fiduciary duty "must be pleaded with particularity" per the requirements of CPLR 3016(b)). Like seemingly everything to do with fiduciary duties, however, there are multiple counterexamples to this general rule. *See, e.g., Biales v. 10 E. End Ave. Owners, Inc.*, 85 Misc. 3d 1202(A), 225 N.Y.S.3d 892 (Sup. Ct. N.Y. Co. 2025) (denying motion to dismiss, holding that even though "the complaint does not allege 'specific acts' of wrongdoing 'by specific directors' – i.e., that it does not sufficiently identify which board member did what … this level of specificity is not required for pleading purposes, particularly given that plaintiffs lack access at this stage to many of the documents and other information that would show the involvement and conduct of board members that underlies plaintiffs' fiduciary-duty claims"); *Orlitsky*, 236 A.D.3d 408.

15. *Fletcher v. Dakota, Inc.*, 99 A.D.3d 43, 49 (1st Dep't 2012).

16. *Hersh*, 163 A.D.3d at 500-01 (citations omitted and cleaned up) (emphasis added). Other decisions that should be considered in this "line" of cases include: *O'Hara v. Bd. of Directors of Park Ave. & Seventy-Seventh St. Corp.*, 206 A.D.3d 476, 476–77 (1st Dep't 2022) ("because it does not allege that, in refusing to investigate, the directors were acting outside their official capacity, the complaint fails to state a cause of action for breach of fiduciary duty"); *Frankel v. Bd. of Managers of 392 Cent. Park W. Condo.*, 177 A.D.3d 465, 466 (1st Dep't 2019) ("The causes of action for breach of fiduciary duty, however, were correctly dismissed, as the complaint fails to allege wrongdoing independent of the individual defendants' conduct as board members"); *Cohen v. Kings Point Tenant Corp.*, 126 A.D.3d 843, 845 (2d Dep't 2015) ("the amended complaint was devoid of allegations that the defendants acted tortiously other than within the scope of their authority as Board members of the cooperative"); and *20 Pine St. Homeowners Assn. v. 20 Pine St. LLC*, 109 A.D.3d 733, 735-736 (1st Dep't 2013) (dismissing claim because "the complaint does not allege any individual wrongdoing by the members of the board separate and apart from their collective actions taken on behalf of the condominium").

17. *See Hersh v. One Fifth Ave. Apartment Corp.*, Index No. 157593/2014, NYSCEF Doc. No. 201, available online: https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=q1g540X8WFBuHxdF09n8yw==.

18. *See Jarmuth v. Leonard*, Index No. 152535/2018, NYSCEF Doc. No. 1, available online: https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=enPDpF5Hh2ivI2YvxCThUg==.

19. 187 A.D.3d 407 (1st Dep't 2020).

20. 163 A.D.3d at 501. The defendants in Jarmuth was able to articulate this "principle" in blunt terms: "Based on the plain language of the Complaint, it is tacitly clear that Plaintiff's allegations against [the three individual defendants] are limited to the actions they undertook as Board members. Consequently, as the claims are not based on these Defendants' individual actions independent of their Board roles, dismissal of the complaint is warranted." *See Jarmuth v. Leonard,* Index No. 152535/2018, NYSCEF Doc. No. 25 at 15, available online: https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=kxh3dhmAs4nqTspEgyOydQ==.

21. 38 A.D.3d 1, 10-11 (1st Dep't 2006), *overruled by Fletcher*, 99 A.D.3d 43.

22. 214 A.D.3d at 492. For another example, the court in *Grasid Realty, LLC v. 162 West 56 Classic II Equities LLC*, No. 651712/2020, 2023 WL 3582988, at *4 (N.Y. Sup. Ct. May 17, 2023), dismissed claims against the "board" and individual board members of a condo association for "lacking any specificity alleging individual wrongdoings by the members that can be separate from the collective decision made by the board" (thus breaking the "guilt by association" rule), and then citing the "separate and apart" language of *Hersh.*

23. In a rare exception, the Nassau County Supreme Court issued a decision in 2015 directly critiquing the "director immunity" rule, finding that the argument that "plaintiff must demonstrate independent tortious conduct other than in their capacity as board members" is a "misconstru[al]" of precedent and inconsistent with the holding in *Fletcher* that "there is no principle of corporate law that director liability arises only where the director commits a tort independent of the tort committed by the corporation itself. *See Berkowitz v. 29 Woodmere Blvd. Owners', Inc.*, 50 Misc. 3d 843, 849-50, 23 N.Y.S.3d 830, 835-36 (Sup. Ct. Nassau Co. 2015) (citing *Fletcher*, 99 A.D.3d at 49).