

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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JRM CONSTRUCTION MANAGEMENT, LLC,

Plaintiff,

INDEX NO: 601701/2013

-against-

LONG BEACH MEDICAL CENTER, DORMITORY
AUTHORITY OF THE STATE OF NEW YORK, THE
UNITED STATES DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT, LONG BEACH MEDICAL
CENTER PENSION PLAN, KOMANOFF CENTER FOR
GERIATRIC AND REHABILITATION MEDICINE
PENSION PLAN, ANDY LOPES BUILDING CORP.,
BOYLE SERVICES, INC., KENNETH J. HERMAN, INC.,
WAVERLY IRON CORP., NEW YORK STATE
DEPARTMENT OF LABOR UNEMPLOYMENT
DIVISION, JOEL LUTWIN, DAVID LUTWIN, LEO
LUTWIN, DENNIS DUNN, JENNIFER DANZIG, PARK
EAST CONSTRUCTION CORP., DIRECTOR DOOR
INDUSTRIES, LTD., SECURE DOOR AND
HARDWARE, INC., and NORTHSTAR RECOVERY
SERVICES, INC.,

VERIFIED ANSWER,
COUNTERCLAIM,
AND CROSS-CLAIM

Defendants.

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Pension Benefit Guaranty Corporation (“PBGC”), acting on behalf of Defendants Long Beach Medical Center Pension Plan (“Long Beach Pension Plan”) and Komanoff Center for Geriatric and Rehabilitative Medicine Pension Plan (“Komanoff Pension Plan”, and collectively with the Long Beach Pension Plan, the “Plans”), through its undersigned counsel, as and for its Verified Answer to the Amended Verified Complaint, alleges as follows:

1. Paragraph 1 does not contain factual allegations which require a responsive pleading.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 2.

3. Admits the allegations in Paragraph 3 that Long Beach Medical Center, fka Long Beach Memorial Hospital, fka Long Beach Memorial Hospital, Inc. (“LBMC”) is a not-for-profit corporation organized under the laws of the State of New York, with its principal place of business located at 455 East Bay Drive, Long Beach, New York; and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegation in Paragraph 3.

4. Admits the allegations in Paragraph 4 that the Dormitory Authority of the State of New York (“DASNY”) is a New York state government entity with an office at 515 Broadway, Albany, NY 12207. On information and belief, the mortgage granted by LBMC to DASNY has been satisfied.

5. Admits the allegations in Paragraph 5 that the United States Department of Housing and Urban Development (“HUD”) is a United States government entity with an office at 26 Federal Plaza, New York, NY 10278. On information and belief, the mortgage granted by LBMC to HUD has been satisfied.

6. Admits the allegations in Paragraph 6 that the Long Beach Pension Plan is a pension plan covered by the Employee Retirement Income Security Act of 1974 (“ERISA”), *as amended*, 29 U.S.C. §§ 1001-1461; that PBGC, a wholly-owned United States government corporation that administers and enforces the defined benefit pension plan termination insurance program under ERISA, is the statutory trustee of the terminated Long Beach Pension Plan; that PBGC is headquartered at 1200 K Street, N.W., Washington, D.C. 20005; and that all of LBMC’s property including the Real Property (as defined below) is subject to a perfected lien for unpaid minimum funding contributions in favor of the Long Beach Pension Plan (“Long

Beach Plan Lien”), enforceable by PBGC and having the priority of a federal tax lien, pursuant to 26 U.S.C. § 430(k). The amount of the Long Beach Plan Lien is \$4,971,749, plus interest from April 15, 2010, which will continue to accrue until payment in full.

7. Admits the allegations in Paragraph 7 that the Komanoff Pension Plan is a pension plan covered by ERISA; that the PBGC, a wholly-owned United States government corporation that administers and enforces the defined benefit pension plan termination insurance program under ERISA, is the statutory trustee of the terminated Komanoff Pension Plan; that PBGC is headquartered at 1200 K Street, N.W., Washington, D.C. 20005; and that all of LBMC’s property including the Real Property (as defined below) is subject to a perfected lien for unpaid minimum funding contributions in favor of the Komanoff Pension Plan (“Komanoff Plan Lien”), enforceable by PBGC and having the priority of a federal tax lien, pursuant to 26 U.S.C. § 430(k). The amount of the Komanoff Plan Lien is \$1,306,806, plus interest from April 15, 2010, which will continue to accrue until payment in full.

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 8.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 9.

10. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 10.

11. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11.

12. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 12.

13. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 13.

14. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 14.

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 15.

16. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 16.

17. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 17.

18. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 18.

19. Paragraph 19 does not contain factual allegations which require a responsive pleading.

20. Paragraph 20 does not contain factual allegations which require a responsive pleading.

21. Admits the allegations in Paragraph 21 that LBMC is the owner of the real property in the State of New York, County of Nassau, known as 455 East Bay Drive, Long Beach, New York (the "Real Property"). Denies knowledge or information sufficient to form a belief as to the truth of the remaining allegation in Paragraph 21.

22. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 22.

23. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 23.

24. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 24.

25. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 25.

26. Paragraph 26 does not contain factual allegations which require a responsive pleading; to the extent the allegations are or may be deemed to be allegations of fact, PBGC denies knowledge or information sufficient to form a belief as to their truth.

27. Paragraph 27 does not contain factual allegations which require a responsive pleading; to the extent the allegations are or may be deemed to be allegations of fact, PBGC denies knowledge or information sufficient to form a belief as to their truth.

28. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 28.

FURTHER answering the Amended Verified Complaint, PBGC denies each and every allegation not otherwise specifically admitted.

COUNTERCLAIM AND CROSS-CLAIM

PBGC, acting on behalf of Defendants Long Beach Pension Plan and Komanoff Pension Plan, through its undersigned counsel, as and for its Counterclaim and Cross-Claim, alleges as follows:

29. PBGC repeats and realleges the allegations contained in paragraphs 1 through 28.

Funding Liens

30. The employer responsible for making contributions to a defined benefit pension plan, and each member of its “controlled group”, if any, are jointly and severally liable to the plan for contributions necessary to satisfy the minimum funding standards under sections 412 and 430 of the Internal Revenue Code of 1986, as amended (“IRC”), and sections 302 and 303 of ERISA. IRC § 412(b)(1), (2); 29 U.S.C. § 1082(b)(1), (2).

31. Once a minimum funding contribution is due and unpaid, such that the unpaid balance of minimum funding contributions to the pension plan including interest (“Unpaid Balance”) exceeds \$1,000,000, a lien (“Funding Lien”) in favor of the plan in the amount of the Unpaid Balance arises “upon all property and rights to property, whether real or personal, belonging to [the employer] and any other person who is a member of the same controlled group. . . .” IRC § 430(k); *see also* 29 U.S.C. § 1083(k) (same).

32. Funding Liens are enforceable by PBGC. IRC § 430(k)(5); 29 U.S.C. §§ 1083(k)(5), 1303(e)(1)(B).

33. Funding Liens are perfected upon PBGC’s filing of a notice of federal lien in the appropriate jurisdiction(s).¹

34. The priority of a Funding Lien is determined in the same manner as a federal tax lien under IRC § 6323. 26 U.S.C. § 430(k)(4)(C); 29 U.S.C. § 1368(c)(1).

¹ *See* IRC § 430(k)(4)(C), 29 U.S.C. § 303(k)(4)(C) (rules similar to those under 29 U.S.C. § 1368(c) apply to Funding Liens); 29 U.S.C. § 1368(c)(4) (notices of liens to be filed in the same manner as federal tax liens under IRC sections 6323(f) and (g)); IRC § 6323(a), (f) (federal tax liens perfected by filing notices).

Employer Controlled Group

35. At all relevant dates, the Long Beach Pension Plan covered employees of LBMC, such that LBMC was the employer responsible for making contributions to the Long Beach Pension Plan.

36. At all relevant dates, the Komanoff Pension Plan covered employees of Long Beach Memorial Nursing Home, Inc., dba The Komanoff Center for Geriatric and Rehabilitative Medicine (“Komanoff”), such that Komanoff was the employer responsible for making contributions to the Komanoff Pension Plan.

37. A “controlled group” with respect to any person consists of that person and all other persons under “common control” with that person, as determined under PBGC regulations consistent and coextensive with Treasury regulations under IRC § 414(b) and (c). 29 U.S.C. § 1301(a)(14)(A).

38. Common control exists between a tax-exempt organization and another organization if at least 80% of the directors or trustees of one organization are representatives of the other organization. Treas. Reg. § 1.414(c)-5(b) (applied to ERISA under 29 C.F.R. § 4001.3(b)).

39. At all relevant dates, LBMC and Komanoff were tax-exempt organizations.

40. At all relevant dates, at least 80% of Komanoff’s board of directors were representatives of LBMC.

41. At all relevant dates, LBMC and Komanoff (collectively, the “Controlled Group Members”) were under common control with each other, composed a controlled group, and therefore were and are jointly and severally liable for all contributions to the Plans required by law.

Long Beach Plan Lien

42. At all relevant times, the Long Beach Pension Plan has been covered under ERISA § 4021 and its funding target attainment percentage has been less than 100, such that it has been a plan to which IRC § 430(k) and 29 U.S.C. § 1083(k) apply. *See* IRC § 430(k)(2); 29 U.S.C. § 1083(k)(2).

43. The Controlled Group Members failed to make minimum funding contributions to the Long Beach Pension Plan, such that a Funding Lien, *i.e.*, the Long Beach Plan Lien, arose in favor of the Long Beach Pension Plan against all of the Controlled Group Members' assets, including the Real Property.

44. As of October 15, 2008, the amount of the Long Beach Plan Lien was \$1,660,589. A Notice of Federal Lien in that amount, indicating that interest would accrue until the required contributions were made, was filed with the County Clerk of Nassau County on January 20, 2009. *See* Exhibit A.

45. As of January 15, 2009, the Controlled Group Members failed to make another minimum funding contribution to the Long Beach Pension Plan in the additional amount of \$632,709. A Notice of Federal Lien in that amount, indicating that interest would accrue until the required contributions were made, was filed with the County Clerk of Nassau County on March 25, 2009.² *See* Exhibit B.

46. As of April 15, 2009, the Controlled Group Members failed to make another minimum funding contribution to the Long Beach Pension Plan in the additional amount of \$708,007. A Notice of Federal Lien in that amount, indicating that interest would accrue until

² For the avoidance of doubt, the statutes provide that there is a single lien securing the entire Unpaid Balance. IRC § 430(k); *see also* 29 U.S.C. § 1083(k) (same). Therefore, the Long Beach Plan Lien was perfected in its entirety on January 20, 2009. Nevertheless, PBGC routinely files additional Notices of Federal Lien when subsequent minimum funding contributions are missed to provide public notice of the increased Unpaid Balance of the lien.

the required contributions were made, was filed with the County Clerk of Nassau County on June 12, 2009. *See* Exhibit C.

47. As of September 15, 2009, the Controlled Group Members failed to make minimum funding contributions to the Long Beach Pension Plan, due on that date and on July 15, 2009, totaling, with interest, an additional amount of \$1,160,934. A Notice of Federal Lien in that amount, indicating that interest would accrue until the required contributions were made, was filed with the County Clerk of Nassau County on March 15, 2010. *See* Exhibit D.

48. By agreement on October 20, 2010, the Long Beach Pension Plan terminated with a retroactive termination date, under 29 U.S.C. § 1348, of July 31, 2009. Accordingly, the termination resulted in a short plan year, with two remaining required contributions to the Long Beach Pension Plan due on August 15, 2009 and April 15, 2010.³

49. The Controlled Group Members failed to make both of those remaining required contributions to the Long Beach Pension Plan. The amount of those contributions, with interest, as of April 15, 2010, was \$433,879. A Notice of Federal Lien in that amount, indicating that interest would accrue until the required contributions were made, was filed with the County Clerk of Nassau County on May 9, 2012. *See* Exhibit E.

50. As indicated on the Notice of Federal Lien filed May 9, 2012, the Long Beach Plan Lien totaled \$4,971,749 as of April 15, 2010. *See* Exhibit E.

51. The Long Beach Plan Lien is a valid lien on the Real Property in the amount of the Unpaid Balance, totaling \$4,971,749 plus interest from April 15, 2010, which will continue to accrue until the Unpaid Balance is paid in full.

³ Determination of Minimum Required Pension Contributions, 73 Fed. Reg. 20203, 20217 (proposed April 15, 2008) (to be codified at Treas. Reg. § 1.430(j)-1(f) (Example 7)).

52. The Long Beach Plan Lien on the Real Property was perfected on January 20, 2009, the date that the first Notice of Federal Lien was filed with the County Clerk of Nassau County.

53. On information and belief, there are no liens on the Real Property that are senior to the Long Beach Plan Lien, except for any lien that was perfected before the Long Beach Plan Lien was perfected on January 20, 2009.

54. Plaintiff JRM Construction Management, LLC (“JRM”) alleges in ¶¶ 25, 27 of the Amended Verified Complaint that on or about June 27, 2013, it filed a Notice of Mechanic’s Lien against the Real Property with the County Clerk of Nassau County, which it served on LBMC the following day, thereby acquiring a lien on the Real Property (“JRM Lien”).

55. Because the Long Beach Plan Lien was perfected before June 27, 2013, it is entitled to priority over the JRM Lien.

Komanoff Plan Lien

56. At all relevant times, the Komanoff Pension Plan has been covered under ERISA § 4021 and its funding target attainment percentage has been less than 100, such that it has been a plan to which IRC § 430(k) and 29 U.S.C. § 1083(k) apply. *See* IRC § 430(k)(2); 29 U.S.C. § 1083(k)(2).

57. The Controlled Group Members failed to make minimum funding contributions to the Komanoff Pension Plan, such that a Funding Lien, *i.e.*, the Komanoff Plan Lien, arose in favor of the Long Beach Pension Plan against all of the Controlled Group Members’ assets, including the Real Property.

58. As of September 15, 2009, the amount of the Komanoff Plan Lien was \$1,112,206. A Notice of Federal Lien in that amount, indicating that interest would accrue until

the required contributions were made, was filed with the County Clerk of Nassau County on April 7, 2010. *See* Exhibit F.

59. As of July 15, 2010, the Controlled Group Members failed to make quarterly minimum funding contributions to the Komanoff Pension Plan, due on that date and on October 15, 2009; January 15, 2010; and April 15, 2010, totaling, with interest, an additional amount of \$851,994. A Notice of Federal Lien in that amount, indicating that interest would accrue until the required contributions were made, was filed with the County Clerk of Nassau County on September 8, 2010 (“9/8/10 Lien Notice”). *See* Exhibit G.

60. By agreement on October 4, 2011 (“10/4/11 Termination Agreement”), the Komanoff Pension Plan terminated with a retroactive termination date, under 29 U.S.C. § 1348, of July 31, 2009. Accordingly, the termination resulted in a short plan year, with two remaining required contributions to the Komanoff Pension Plan: (1) the final quarterly contribution due on August 15, 2009; and (2) the final contribution due on April 15, 2010, 8 1/2 months after the termination date (together, the “Remaining Short Plan Year Contributions”).⁴

61. The Controlled Group Members failed to make the Remaining Short Plan Year Contributions. However, as a consequence of the retroactive termination date of July 31, 2009, and the short plan year resulting from the 10/4/11 Termination Agreement, the quarterly minimum funding contributions covered by the 9/8/10 Lien Notice were extinguished. Because the amount of those quarterly minimum funding contributions, with interest, was less than the total of the Remaining Short Plan Year Contributions, with interest, PBGC did not file an additional Notice of Federal Lien on behalf of the Komanoff Pension Plan.

⁴ Determination of Minimum Required Pension Contributions, 73 Fed. Reg. 20203, 20217 (proposed April 15, 2008) (to be codified at Treas. Reg. § 1.430(j)-1(f) (Example 7)).

62. With interest, the amount of the Komanoff Plan Lien was \$1,306,806 as of April 15, 2010.

63. The Komanoff Plan Lien is a valid lien on the Real Property in the amount of the Unpaid Balance, totaling \$1,306,806 plus interest from April 15, 2010, which will continue to accrue until the Unpaid Balance is paid in full.

64. The Komanoff Plan Lien on the Real Property was perfected on April 7, 2010, the date that the first Notice of Federal Lien was filed with the County Clerk of Nassau County.

65. On information and belief, there are no liens on the Real Property that are senior to the Komanoff Plan Lien, except for any lien that was perfected before the Komanoff Plan Lien was perfected.

66. Because the Komanoff Plan Lien was perfected before June 27, 2013, it is entitled to priority over the JRM Lien.

WHEREFORE, PBGC demands judgment in its favor as follows:

(a) Finding that the Long Beach Pension Plan has a valid and subsisting priority lien on the Real Property, pursuant to 26 U.S.C. § 430(k), to secure the sum of \$4,971,749 as of April 15, 2010, plus interest from that date;

(b) Finding that the Komanoff Pension Plan has a valid and subsisting priority lien on the Real Property, pursuant to 26 U.S.C. § 430(k), to secure the sum of \$1,306,806 as of April 15, 2010, plus interest from that date;

(c) Declaring that, if the Real Property is sold free and clear of all liens and encumbrances, save the rights of redemption vested in PBGC, the proceeds derived from said sale are to be applied to the payment of the liens of the various parties to this cause in accordance with their respective priorities;

(d) Holding LBMC personally liable to the Long Beach Pension Plan and the Komanoff Pension Plan for any deficiencies, if authorized by law; and

(e) Awarding such other and further relief authorized by law or as may be equitable and just.

Dated: August 30, 2013
Washington, D.C.

Respectfully submitted,

/s/ Louisa A. Fennell
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No Appearances to Date for the Following Defendants:

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The United States Department of Housing and Urban Development
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New York, NY 10278

Andy Lopes Building Corp.
3 South Stone Avenue
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Boyle Services, Inc.
114 Railroad Street
Huntington Station, NY 11746

Kenneth J. Herman, Inc.
151 Dixon Avenue
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25 Commercial Boulevard
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South Huntington, NY 11746

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265 46th Street
Brooklyn, NY 11220

NorthStar Recovery Services, Inc.
35 Corporate Drive, Suite 1155
Trumbull, Connecticut 06611

VERIFICATION BY ATTORNEY'S AFFIRMATION

Louisa A. Fennell, an attorney admitted to practice in the courts of New York, affirms the following pursuant to CPLR 2106: I make this verification pursuant to CPLR 3020(d)(2) on behalf of Defendant/Counterclaimant/Cross-Claimant Pension Benefit Guaranty Corporation, an agency of the United States; that I have read the foregoing Verified Answer, Counterclaim and Cross-claim and know the contents thereof; that the allegations therein are made upon information and belief based upon PBGC records. I believe said allegations to be true.

/s/ Louisa A. Fennell
Louisa A. Fennell

August 30, 2013
Washington, D.C.