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

PRESENT: GISCHE JUDITH J. GISCHE, J.S.C. Justice PART 10

1010 TENANTS CORP

- v -

BARBARA HUBSHMAN

INDEX NO. 602966/09

MOTION DATE

MOTION SEQ. NO. 3

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for 8301 & 8312

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

Cross-Motion: ☒ Yes ☐ No

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).

Upon the foregoing papers, it is ordered that this motion

IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

and mutual cont Oct 27, 2011 in Part 10 @ 9:30 am Rm 232 60C

Dated: SEP 22 2011

HON. JUDITH J. GISCHE J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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1010 Tenants Corp.,

Plaintiff (s),

-against-

Barbara Hubshman,

Defendant (s).

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DECISION/ORDER
Index No.: 602966-2009
Seq. No.: 003

PRESENT:
Hon. Judith J. Gische

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers **Numbered**

Def's OSC (prelim injunction) w/BHW affirm, BH affid 1
Pltf's x/m (3212) w/MW, RL, CD, EM affids, exhs 2
Def's reply w/BH, DRS affid, BHW affirm, exhs 3
Pltf's reply w/JVDT affirm, EM affid, exh 4
Steno Minutes 4/28/11 5

Upon the foregoing papers, the decision and order of the court is as follows:

This action is for a declaratory judgment and a permanent injunction. Plaintiff 1010 Tenants Corp., ("plaintiff" at times "the coop" or "lessor") is the owner of a residential building located at 1010 Fifth Avenue, New York, New York ("building"), defendant Barbara Hubshman ("Hubshman" sometimes "lessee") is the proprietary lessee of a coop apartment ("penthouse") in that building. The parties have a long standing dispute regarding the outdoor or roof terrace ("roof terrace") adjacent to Hubshman's penthouse. The roof terrace is landscaped and covered with a number of trees, plants and other foliage. The dispute is whether the membrane of the roof terrace is damaged and, if so, whether such damage caused incursions of water into the unit directly below Hubshman's (14F) and/or affected the structural integrity of the building. For some time, the coop has sought to remove the plantings so it could replace the

entire membrane beneath. The coop has since considered the possibility of repairing the membrane in segments.

Previously, plaintiff sought an order requiring Hubshman to allow access to her roof terrace so the coop could remove and replace the membrane that is on the terrace, beneath the garden. The court denied the coop's motion, finding that the coop had not satisfied the three prongs necessary for a preliminary injunction (Order, Gische J., 12/17/09). Subsequently, Hubshman brought her own motion for a preliminary injunction for an ordering enjoining the coop from drilling holes into the roof terrace to insert moisture detecting probes. The court granted Hubshman's motion and ordered the coop to provide her with a proposed contract for the invasive testing they sought to perform (Order, Gische J., 7/7/10).

Given the extensive litigation between the parties, the reader is presumed to be familiar with not only with those prior orders, but all the underlying facts of this case contained therein.

Arguments

Once again, the parties' dispute involves their differing interpretations of paragraph 7 of the proprietary lease and their respective rights and responsibilities thereunder. Paragraph 7 of the proprietary lease provides in relevant part as follows:

> "7. If the apartment includes a terrace, balcony, or a portion of the roof adjoining a penthouse, the Lessee shall have and enjoy the exclusive use of the terrace or balcony or that portion of the roof appurtenant to the penthouse, subject to the provisions of his lease and to the use of the terrace or balcony by the Lessor to the extent herein permitted [* * *] No top soil, earth, trees, bushes or other planting, fences, structures or lattices shall be erected or installed on the terraces, balconies, or

> roof of the building without the prior written approval of the Lessor, which approval shall not be unreasonably withheld, except that such approval shall not be required for any existing top soil, earth, trees, bushes or other planting, fences, lattices, or for the replacement of same. Any top soil, earth, trees, bushes or other planting or other structures erected or installed by the Lessee or his predecessor in interest, may at the expense of the Lessor, be removed for the purpose of repairs, upkeep or maintenance of the building, provided that Lessor shall, at its expense, restore anything which has been removed with a like item of substantially the same quality and appearance . . ."
>
> [***]
>
> "If the Lessor is required, by the terms of this lease, to perform any work on the portion of the roof appurtenant to a penthouse it shall submit to the Lessee its proposed contract for the performance of the same. Lessee shall have five (5) business days after receipt of such contract within which to notify the Lessor in writing whether or not Lessee elects to perform such work, and, if Lessee so elects, the Lessor shall pay to Lessee, upon completion of such, the price for such work set forth in its proposed contract for the performance of the same, or such lesser sum as lessee expends for such work. If an emergency requires immediate repairs, then Lessor may immediately perform such work as is necessary to deal with the emergency and thereafter the foregoing provisions shall be applicable to the performance of any additional work in connection with the condition which gave rise to the emergency."

Since the court's last order dated July 7, 2010, the coop has notified Hubshman that it will need to have four (4) new probes taken of the roof terrace. By letter dated March 23, 2011, the coop provided Hubshman with a bid by United Construction[1] to have the work done. According to the coop, once the probes are completed, the Board,

[1]The bid is incorrectly dated "March 18, 2010." The parties agree the correct date is "March 18, 2011."

with the assistance of its architect, Israel Berger & Associates' ("IBA"), will determine the work that has to be done on the roof terrace and solicit bids for it. The board will then select a contractor and present the proposed contract to Hubshman so she can decide whether she wants to have the work done by the plaintiff's contractor or by a contractor of her own choosing.

In support of her motion for a preliminary injunction, Hubshman argues that she has the right to perform "any" work done on the roof terrace and that the coop cannot force her consultants and contractors to use only the master plans and specifications prepared by the coop's consultants. Hubshman is convinced that the coop has already received a proposal from IBA for the roof replacement project ,but is withholding it. Hubshman also claims the coop has artificially separated the proposal for the probe work from the IBA proposal for the overall project just so the coop can limit her involvement in the project and deprive her of the right to perform the work from the beginning to end. Thus, according to Hubshman the coop has decided to go forward with a course of action and the probes are not to determine *whether* the roof membrane has to be replaced, but part of the necessary plans and specifications for the work. Based on these arguments, Hubshman seeks an order confirming her right to elect to take over the roof replacement/waterproofing project from the coop and have the work performed by her own professionals.

These claims are all denied by the coop. Edward Madocks, employed by IBA as an architect, denies[2] IBA has prepared any plan or proposal for the work on the roof.

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[2]The sworn affidavit of Edward Madocks in the coop's cross motion is dated "April 7, 2010." This is apparently a typographical error and the correct date appears

He represents the probe will help determine the nature and scope of the work that needs to be done.

In addition to opposing Hubshman's motion, the coop has cross moved for summary judgment, declaring the parties' rights under the proprietary lease. The following causes of action ("COA")[3] are asserted by the coop: 1st COA- the coop is entitled to full, unrestricted access to have repair work done by a contractor of its choice with the expenses born by the coop; 2nd COA- the defendant is in breach of the proprietary lease by refusing to allow the work or doing it herself and; 3rd COA - the coop is entitled to a permanent injunction requiring defendant to give them unrestricted access to the terrace to make repairs.

The coop states that it is ready to discontinue its claims and will consent to certain of the declaratory relief sought by Hubshman in her counterclaims which are for legal fees (1st CC), an order directing the coop to pay for any work she does if she elects to have her own professionals fix the water leak condition (2nd CC) and a declaration of her rights under paragraph 7 of the proprietary lease (3rd CC).

In connection with its motion for summary judgment, the coop seeks the following declarations:

a) that except in the case of emergency, the coop has to provide Hubshman with prior notice and obtain her consent before entering her unit and the roof terrace to inspect the premises or make or facilitate repairs;

b) Hubshman has the right to the exclusive use and quiet enjoyment of her

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to be "April 7, 2011" since Madocks addresses Hubshman's allegations.

[3]Though the coop moved for and was granted the right to serve an amended complaint pursuant to the 7/7/10 Order, it was never served.

roof terrace, subject to the provisions of her proprietary lease;

c) Hubshman has the right to keep and maintain her roof gardens, including topsoil, plantings and, trees, subject to the provisions of her proprietary lease;

d) the coop has the authority and responsibility to determine what work, if any, is to be performed on the roof terrace to prepare plans and specifications for such work, including protection and restoration of the garden and to obtain a proposed contract for the work with professionals of its own choosing;

e) if the work will be invasive or disruptive to Hubshman's terrace garden, the coop's contract for the work must be presented to Hubshman who will then have five (5) business days to notify the coop in writing of whether she elects to perform the work herself by contractors of her choosing; absent such notice, the coop may proceed with the work and Hubshman shall allow access for the work;

f) the coop shall determine when and whether the work is satisfactorily completed in accordance with the contract terms. Upon satisfactory completion, the coop shall, if Hubshman has elected to perform the Work, reimburse Hubshman's actual costs therefore up to the amount of the proposed contract originally obtained by the Coop and presented to Hubshman;

d) Dismissing all remaining claims and counterclaims of the complaint and answer and counterclaims;

In seeking summary judgment, the coop specifically seeks a determination from the court that plaintiff, not Hubshman, can determine what, if any, work is to be on the roof terrace and that the coop has the authority and responsibility to prepare the plans and specifications for said work.

In opposition to the coop's cross motion and in further support of her own motion for injunctive relief, Hubshman argues that the coop is required to provide her with "any and all proposals prepared by or behalf the coop or managing agent with respect to roof work or repairs including, the proposal previously prepared by the coop's architect, not

just the proposal for the probe work that needs to be done now. Thus, according to Hubshman, the coop's motion should be denied because the declaration is seeks is not available to it. Hubshman contends she has the contractual right to take over the entire project from the coop, employing her own professionals and perform the same work, including testing.

Though not having moved for such relief, Hubshman urges the court to search the record and grant her summary judgment on her 2nd and 3rd counterclaims which are, respectively, for an ordering directing the coop to pay for any work she does if she elects to have her own professionals fix the water leak condition and a declaration of her rights under paragraph 7 of the proprietary lease. Comparing her 2nd counterclaim and the declaratory judgment she seeks in connection with "a" "b" and "c" of her 3rd counterclaim, they are virtually identical to the relief the coop seeks on summary judgent. There are, however, significant difference between the relief sought by the coop on summary judgment and the declaration sought by Hubshman on the three remaining subparts of her 3rd counterclaim. Hubshman seeks the following declaration in her favor:

d) the coop is obligated to present Hubshman with a proposed contract for any work on her roof terrace that it claims is required to be performed under the Proprietary Lease;

e) After being presented by the coop with a proposed contract, Hubshman has the right to elect whether to take over from the coop Co-op any work that is required to be performed on her roof terrace;

f) Hubshman has the right to have her own consultants, experts and contractors perform such work at the coop's expense.

Applicable Law

The party seeking a preliminary injunction must demonstrate a probability of

success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor (*see*, CPLR § 6301; Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 NY3d 839 [2005]; Aetna Insurance Co., Inc. v. Capasso, 75 NY2d 860 [1990]; W.T. Grant Co. v. Srogi, 52 NY2d 496 [1981]). Although the party seeking a preliminary injunction does not have to provide conclusive proof of its right to such relief, and a preliminary injunction can, in the court's discretion, even be issued where there are disputed facts (Terrell v. Terrell, 279 A.D.2d 301 [1st Dept 2001]), generally a preliminary injunction will be denied unless the relief is necessitated and justified from the undisputed facts (O'Hara v. Corporate Audit Co., 161 AD2d 309 [1st Dept 1990]).

Since the coop has cross moved for summary judgment, it has the initial burden of tendering sufficient evidence to eliminate any material issues of fact from the case by evidentiary proof in admissible form (Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980]). If the coop makes a prima facie showing of entitlement to summary judgment, the burden will then shift to Hubshman must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]; Forrest v. Jewish Guild for the Blind, 309 A.D.2d 546 [1st Dept 2003]). Since issues of law have been raised, they are for the court to decide and not by the trier of fact (Hindes v. Weisz, 303 A.D.2d 459 [2nd Dept 2003]).

Discussion

Paragraph 7 reserves certain rights to Hubshman, as the lessee of an apartment with an appurtenant roof terrace. Pursuant to paragraph 7, if the lessor is required, by the terms of this lease, to perform any work on the portion of the roof appurtenant to a penthouse, the lessor must provide the lessee with its proposed contract for the work to

be performed. The lessee then has five (5) business after receiving the contract to decide whether s/he elects to hire his or her own person to perform such work. Notwithstanding such special contractual rights conferred on Hubshman, a shareholder in the cooperative corporation that owns the building, the coop still has the ultimately responsible for making sure the building is well maintained, in a reasonably safe condition and code compliant, as these are nondelegable duties of ownership.

The issue raised on the last motion was whether the insertion of the probes by the coop's professionals could be done without following the procedure set forth in paragraph 7 because there was, as argued by the coop, an emergent situation (i.e. "emergency") involving leaks from the roof terrace area into the apartment directly below. The court found that there was no emergency condition and that Hubshman had proved the probes were sufficiently intrusive into the roof terrace membrane to be considered "work" as that term is used in paragraph 7, thus requiring compliance with the notice condition in that section of the proprietary lease.

The present issue is whether Hubshman has a right to control all aspects of the water/leak mitigation project. She claims that the coop is withholding information and proposals and that in order for her to properly evaluate the (anticipated) proposal to have work done on her roof terrace, she needs all these proposals, etc., up front. In making this argument, Hubshman suggests that she has been kept in the dark about the complaints involving her roof terrace. This is clearly not the case. Hubshman has known for some time that the garden on her roof terrace is being blamed for the leaks into the apartment below. In fact, Hubshman hired her own professionals to inspect 14F and render an opinion about how to proceed. As far back as July 2009, WJE advised

her in writing that probes are necessary to determine whether the problem with leaks into 14F is attributable to a leaky membrane under her garden. Consequently, any argument by Hubshman that her involvement in the project has been severely curtailed by the coop's actions to date is incorrect.

Paragraph 7 provides that "if the Lessor is required, by the terms of this lease, to perform any work on the portion of the roof appurtenant to a penthouse it shall submit to the Lessee its proposed contract for the performance of the same..." This clause does not grant Hubshman the right to decide whether "by the terms of the lease" work has to be done. Paragraph 7 does not erode the coop's right to manage the affairs of the building or make decisions about whether work is necessary. Paragraph 2 of the proprietary lease provides that the "Lessor shall at its expense keep in good repair all of the building including all of the apartments..." except for repairs that are the responsibility of the lessee. Paragraph 18 sets forth the responsibilities for repairs by the lessee. Such repairs include things commonly found in the interior of an apartment, such as windows, window panes, window frames, plumbing fixtures and even a "terrace door."

Although paragraph 7 allows Hubshman the right to decide who does the "work" and even requires (within certain parameters) that the coop to pay for the "work" if she elects to have the work done by her own professionals, the lessor is still the entity responsible under the terms of the proprietary for any work that has to be performed on the roof appurtenant to Hubshman's penthouse. Whereas Hubshman is entitled to the coop's "proposed contract for the performance of the [work]" and she even has the right to have the work performed by her own professionals, she does not have the right to have her own professionals second guess the coop board's decision that, in the first

place, such work is necessary or have her own professionals prepare plans and specifications for it (*see*, 77 E. 12 Owners, Inc. v. Yager, 137 Misc.2d 138 [N.Y.Sup.1987]). Thus the business judgment rule gives the cooperative board the right to determine and make structural repairs (Matter of Levenduskv v One Fifth Ave. Apt Corp., 75 NY2d 530 [1990]). Since Hubshman has not proved a likelihood of success on the merits, and all three prongs must be met in order for a movant to establish its right to a preliminary injunction, her motion for a preliminary injunction is denied.

Summary Judgment

The coop seeks summary judgment, declaring the rights of the parties. None of the "declarations" it seeks are claims it asserted in its complaint,but relief sought by Hubshman in her counterclaims. Thus, declarations that a) except in the case of emergency, the coop has to provide Hubshman with prior notice and obtain her consent before entering her unit and the roof terrace to inspect the premises or make repairs, b) Hubshman has the right to the exclusive use and quiet enjoyment of her roof terrace, subject to the proprietary lease and c) "the right to keep and maintain her roof gardens, including topsoil, plantings and, trees..." are all declarations sought by Hubshman and she asks for reverse summary judgment to be granted to her.

Pursuant to CPLR 3212 [b], the court has the discretion to render summary judgment for a non-moving party on the issues raised in the motion for summary judgment (Dunham v. Hilco Const. Co., Inc., 89 N.Y.2d 425 [1996]). Here, both sides have laid bare their proof. Furthermore, by agreeing to discontinue the claims in its complaint and consenting to certain of the declaratory relief sought by Hubshman in her counterclaim, the coop has tacitly agreed the court should search the record and see

whether Hubshman is entitled to a declaration in her favor (Mini Mint Inc. v. Citigroup, Inc., 83 A.D.3d 596 [1st Dept 2011]).

After searching the record, the court denies the coop's motion for summary judgment in its favor on declarations identified by the parties as "a," "b" and "c" of the 3rd counterclaim and grants reverse summary judgment to Hubshman, declaring that:

a) Except in cases of emergency, the coop must provide Hubshman with prior notice and obtain her consent before entering her unit and the roof terrace to inspect the premises or make or facilitate repairs;

b) Hubshman has the right to the exclusive use and quiet enjoyment of her roof terrace, subject to the proprietary lease;

c) Hubshman has the right to keep and maintain her roof gardens, including topsoil, plantings and, trees subject to the proprietary lease;

The remaining three declarations frame, and are at the heart of, the parties' dispute over which side controls "work" that has to be done on the roof terrace. The coop seeks these declarations:

d) the coop has the authority and responsibility to determine what work, if any, is to be performed on the roof terrace to prepare plans and specifications for such work, including protection and restoration of the garden and to obtain a proposed contract for the work with professionals of its own choosing;

e) if the work will be invasive or disruptive to Hubshman's terrace garden, the coop's contract for the work must be presented to Hubshman who will then have five (5) business days to notify the coop in writing of whether she elects to perform the work herself by contractors of her choosing; absent such notice, the coop may proceed with the work and Hubshman shall allow access for the work;

f) the coop shall determine when and whether the work is satisfactorily completed in accordance with the contract terms. Upon satisfactory completion, the coop shall, if Hubshman has elected to perform the Work, reimburse Hubshman's actual costs therefore up to the

amount of the proposed contract originally obtained by the Coop and presented to Hubshman;

Hubshman seeks these declarations:

d) the coop is obligated to present Hubshman with a proposed contract for any work on her roof terrace that it claims required to be performed under the Proprietary Lease;

e) After being presented by the coop with a proposed contract, Hubshman has the right to elect whether to take over from the coop Co-op any work that is required to be performed on her roof terrace;

f) Hubshman has the right to have her own consultants, experts and contractors perform such work at the coop's expense.

After reviewing the proprietary lease and considering the parties' arguments, this is the declaration by the court of the parties' rights under the proprietary lease:

> The coop has the authority and responsibility for repairs, as set forth in paragraph 2 of the proprietary lease. If the coop determines that pursuant to the terms of the proprietary lease, work is required to be performed on the roof terrace of Hubshman's apartment, the coop shall prepare the plans and specifications for such work, including protection and restoration of the garden, and obtain a proposed contract for the work to be done with professionals of its own choosing. The coop shall then submit its proposed contract to Hubshman. Hubshman shall then have five (5) business days after receipt of such contract within which to notify the coop in writing whether or not she elects to perform such work. If Hubshman so elects, the coop shall, upon completion of such work, reimburse Hubshman for her actual costs for such work up to the amount of the proposed contract originally obtained by the Coop and presented to Hubshman. If an emergency requires immediate repairs, then the coop may immediately perform such work as is necessary to deal with the emergency and thereafter the foregoing provisions shall be applicable to the performance of any additional work in connection with the condition which gave rise to the emergency.

In deciding which side is entitled to summary judgment in its favor, the court

evaluates not only how far each side has strayed from the express terms of the proprietary lease, but also the relief originally sought by that party in its own pleadings. When examining the complaint, it is clear that the court's declaration bears no semblance to the relief sought by the coop; it more closely resembles what Hubshman asserted as counterclaims. Therefore, the coop's motion for summary judgment in its favor on the counterclaims is denied. After searching the record, the court grants summary judgment to Hubshman on her 2nd and 3rd counterclaims. The court's declaration is set forth above (Mini Mint Inc. v. Citigroup, Inc., supra).

Since neither side has moved with respect to the issue of legal fees (1st CC), this remains for trial. The parties shall come to court for a pre-trial conference on **October 27, 2011**, the next date this case is scheduled to appear in Part 10.

Conclusion

In accordance it is hereby

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that the court has searched the record and granted the non-moving defendant summary judgment in her favor; and it is further

ORDERED, DECLARED AND ADJUDGED that:

> The coop has the authority and responsibility for repairs, as set forth in paragraph 2 of the proprietary lease. If the coop determines that pursuant to the terms of the proprietary lease, work is required to be performed on the roof terrace of Hubshman's apartment, the coop shall prepare the plans and specifications for such work, including protection and restoration of the garden, and obtain a proposed contract for the work to be done with professionals of its own choosing. The coop shall then submit its proposed contract to Hubshman. Hubshman shall then have five (5) business days after receipt of

such contract within which to notify the coop in writing whether or not she elects to perform such work. If Hubshman so elects, the coop shall, upon completion of such work, reimburse Hubshman for her actual costs for such work up to the amount of the proposed contract originally obtained by the Coop and presented to Hubshman. If an emergency requires immediate repairs, then the coop may immediately perform such work as is necessary to deal with the emergency and thereafter the foregoing provisions shall be applicable to the performance of any additional work in connection with the condition which gave rise to the emergency; and it is further

ORDERED that the parties shall come to court for a pre-trial conference on **October 27, 2011**, the next date this case is scheduled to appear in Part 10; and it is further

ORDERED the plaintiff has voluntarily discontinued its claims against defendant; and it is further

ORDERED that any relief requested but not addressed is hereby denied; and it is further

ORDERED that this constitutes the decision, order and Judgment of the court.

Dated: New York, New York
September 22, 2011

So Ordered:

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).

Hon. Judith J. Gische, JSC