SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH SUPREME COURT JUSTICE PART 61
Justice

Index Number : 150338/2012
SILVER, RICHARD
vs.
MURRAY HILL OWNERS CORP.,
SEQUENCE NUMBER : 001
PREL INJUNCTION/TEMP REST ORDER

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum opinion.

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 12/12/13

HON. ANIL C. SINGH, J.S.C.
SUPREME COURT JUSTICE

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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RICHARD SILVER,

Plaintiff,

-against- Index No.: 150338/12

MURRAY HILL OWNERS CORP.,

Defendant.

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HON. ANIL C. SINGH, J.

Motion sequence numbers 001 and 002 are consolidated for disposition.

Plaintiff, a tenant/shareholder of the defendant cooperative corporation (the Co-op), seeks injunctive and declaratory relief in order to install three air-conditioning and heating (HVAC) units on the roof/common space of the Co-op to replace three units that he installed in 1982.

Plaintiff moves for temporary injunctive relief compelling defendant to permit him to install the equipment and to amend the caption. Defendant moves for summary judgment dismissing the complaint. Plaintiff opposes that motion and cross-moves for summary judgment.

In the first cause of action of the complaint, plaintiff seeks a declaration that the Co-op breached its obligations under the proprietary lease (the Lease) and that plaintiff is entitled to replace the existing HVAC units with new units. In the complaint's second cause of action, plaintiff seeks an order enjoining defendant from preventing him from replacing the units and compelling defendant to permit their installation. The third cause of action is for an order

preliminarily enjoining the Co-op from preventing plaintiff from replacing the units.

Background

The following facts are not disputed. Plaintiff has been a shareholder and lived in the Co-op's building for over 30 years and, in 1982, installed three HVAC units, each of which is approximately six feet (in length) by three feet by four feet, on common space on top of the Co-op's roof, where they remain, although now disconnected. The 1982 installation involved boring through the Co-op's roof to plaintiff's apartment and, without contradiction, plaintiff avers that the Co-op had building personnel inspect the installation/construction at that time.

In October 2011, plaintiff attempted to replace the HVAC units, but the work was halted by the Co-op's president, John Vaccaro (Vaccaro), who happened upon workers who were about to use the freight elevator to transport the equipment. Vaccaro avers that, when he halted the work, plaintiff claimed to have permission from the building's superintendent and a "grandfathered in" right to install the equipment. Plaintiff avers that when he began to make plans to replace the existing HVAC units, he had discussions with the Co-op's managing agent about what needed to be done; obtained certain insurance and, based on instructions from the managing agent, obtained from the contractor a certificate of liability insurance.[1] Plaintiff does not indicate that he provided copies of the certificate to the Co-op prior to attempting the installation, and he had not sought approval from the Co-op's board of directors (the Board).

Plaintiff submits correspondence that appears to indicate that, in 1982, the Co-op

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[1] The certificate of insurance states that the Co-op and its managing agent were to be included as additional insureds where required by written contract entered into before the work was commenced, but there was no written agreement between plaintiff and defendant then.

approved the installation of an HVAC system, as well as other work. However, the April 1982 approval letter also informed plaintiff that he was required to execute an alteration agreement prior to commencing work. Vaccaro avers that the Co-op's tenant file for plaintiff does not contain an executed agreement, and that plaintiff has not provided one. Plaintiff does not address whether or not he ever entered into such an agreement.[2] Vaccaro submits a copy of a blank alteration agreement, that he states is from the Co-op's tenant file for plaintiff, which contains an insertion line for a completion date for all approved work, and provides certain rights to the Co-op, and burdens on the tenant, in the event of a transfer or termination of the Lease, including, under certain circumstances, a requirement that the tenant restore the apartment to its original condition (Vaccaro moving affidavit (aff.), exhibit (exh.) G).

The three original HVAC units, which plaintiff states that he disconnected, as they had reached the end of their useful life, ran on electricity provided through a dedicated line that plaintiff had installed in the building in the 1980s. The building's freight elevator does not go up to the roof, and installation of new HVAC units would require their transport from the building's top floor, where there is a staircase, to the rooftop. Plaintiff states that he made the building's superintendent aware that the units were to be carried up the stairs to the roof.[3]

After Vaccaro halted the work, the parties exchanged letters, with plaintiff providing

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[2] Plaintiff argues that an adverse inference or missing documents charge is called for to the extent that any documents are missing from the tenant file, but plaintiff has neither demonstrated nor asserted that a document existed which has not been produced.

[3] Plaintiff's out-of-court statement to the superintendent may be considered only for notice purposes, as it is hearsay to demonstrate how the units were to get to the roof.

some information about the new HVAC units. By letter dated December 27, 2011, from its counsel, the Co-op denied plaintiff's request to replace the HVAC units. The letter stated that plaintiff had failed to provide proof of prior Board approval to install the existing units, or detailed plans and specifications as to the proposed replacement and the manner of installation. The letter also stated that a permit should have been filed with the City of New York for the original installation, but that the Board had seen no evidence that this had been done. The letter continued that the Board wanted a mutual agreement on a modern air-conditioning system, with a smaller footprint, to be placed on the roof at the Board's discretion, and in a different location (Vaccaro moving aff., exh J).

Defendant submits evidence that plaintiff has installed additional heating or cooling equipment for his apartment, including a unit that is located on the building's exterior wall and a window air conditioner (Kalajian aff., ¶¶ 3-8). Plaintiff does not address this evidence, but maintains that he has inadequate heating and cooling in his apartment without the HVAC units. The Co-op submits evidence that it sought entrance to plaintiff's apartment to address any issue with the Co-op's heating system. It is undisputed that plaintiff did not provide access.

Defendant represents that it has no objection to the concept of plaintiff replacing the HVAC units, and that attempts have been made to accommodate him, but that plaintiff has not agreed to provide the Board with the information/documents it seeks. Plaintiff contends that he has submitted the requested documents, but that the Co-op responds with additional demands.

Discussion

The standards for summary judgment are well settled. The moving party bears the burden

of making "a prima facie showing of entitlement to judgment as a matter of law," by submission of sufficient admissible evidence to demonstrate the absence of any genuine issues of fact for trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Once this showing has been made ... the burden shifts to the party opposing the motion ... to produce evidentiary proof in admissible form sufficient to establish the existence of material" fact issues for trial (*id.* at 324). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient [to defeat a well-supported summary judgment motion], as is reliance upon surmise, conjecture, or speculation" (*Grullon v City of New York*, 297 AD2d 261, 263-264 [1st Dept 2002] [citation and internal quotation marks omitted; alteration in original]).

In deciding the motion, the court "should draw all reasonable inferences in favor of the non-moving party and should not pass on issues of credibility" (*Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990]). Summary judgment "should not be granted where there is any doubt as to the existence of a triable issue [of fact] or where the issue is even arguable" (*Chemical Bank v West 95th St. Dev. Corp.*, 161 AD2d 218, 219 [1st Dept 1990] [internal citations and quotation marks omitted]).

The parties dispute the interpretation of Lease ¶ 21 (a), which provides that a

> "lessee shall not, without first obtaining the written consent of the Lessor, which consent shall not be unreasonably withheld or delayed, make in the apartment or building, or on any roof, penthouse, terrace or balcony appurtenant thereto, any alteration, enclosure or addition or any alteration of or addition to the water, gas, or steam risers or pipes, heating or air conditioning system or units, electrical conduits, wiring or outlets, plumbing fixtures, intercommunication or alarm system, or any other installation or facility in the apartment or building. The performance by Lessee of any work in the apartment shall be in accordance with the any applicable rules and regulations of the Lessor and governmental agencies

> having jurisdiction thereof. The Lessee shall not in any case install any appliances which will overload the existing wires or equipment in the building."

(Vaccaro aff., exh. C).

"A lease, like any other contract, is to be interpreted in light of the purposes sought to be attained by the parties" and "construed in accord with the parties' intent" (*112 W. 34th St. Assoc., LLC v 112-1400 Trade Props. LLC*, 95 AD3d 529, 531 [1st Dept 2012] [citations and internal quotation marks omitted]). "[A]n agreement should be read as a whole and its individual provisions considered within their greater context" (*Bovis Lend Lease (LMB), Inc. v Lower Manhattan Dev. Corp.*, 108 AD3d 135, 145 [1st Dept 2013]), and without "undue emphasis . . . placed upon particular words and phrases" (*Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]), "and all terms of a contract must be harmonized whenever reasonably possible" (*Madison Hudson Assoc. LLC v Neumann*, 44 AD3d 473, 480 [1st Dept 2007]). "When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations" (*112 W. 34th St. Assoc., LLC*, 95 AD3d at 531 [internal quotation marks and citation omitted]).

Plaintiff's Motion for Summary Judgment

Plaintiff argues that he is entitled to summary judgment because, under the Lease, Board approval is not required to replace the HVAC units and because defendant does not demonstrate that the Lease requires such approval for the replacement of existing equipment with like-kind equipment, which, plaintiff contends, is not an alteration under the Lease. Plaintiff further

contends that he is required to replace the equipment, under Lease ¶ 18 (a), and analogizes the replacement of the HVAC units to the replacement of a worn kitchen appliance, such as a refrigerator, years after an approved kitchen renovation. Plaintiff argues that defendant's broad interpretation, requiring de novo Board approval for a shareholder to replace an appliance, would produce an absurd result and permit the Board to use Lease ¶ 21 (a) as a catch-all to justify selective enforcement against plaintiff concerning HVAC units that he was previously granted approval to install. Plaintiff maintains that to the extent that paragraph 21 (a) is deemed ambiguous, it should be construed against defendant, the Lease's drafter. Defendant argues that paragraph 21 (a) is not ambiguous, and requires plaintiff to obtain Board approval for the installation.

> "Where the parties dispute the meaning of particular contract terms, the task of the court is to determine whether such terms are ambiguous. The existence of ambiguity is determined by examining the entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed, with the wording viewed in the light of the obligation as a whole and the intention of the parties as manifested thereby read in the context of the entire agreement."

(*Banco Espírito Santo, S.A. v Concessionária Do Rodoanel Oeste S.A.*, 100 AD3d 100, 106 [1st Dept 2012] [citations and internal quotation marks omitted; alteration in original]).

The word "alteration" has been defined, among other ways, as: "the act, process, or result of changing or altering something[;] the act or process of altering[;] the state of being altered[; or] the result of altering: modification" (http://www.merriam-webster.com/dictionary /alteration). To alter is defined as "to change (something)," and, as a transitive verb, "to make different without changing into something else" (http://www.merriam-webster.com/dictionary /alter).

However, a dictionary definition can only go so far, outside of context, in revealing contracting parties' intentions. At issue here is a residential cooperative lease, the agreement between a community of owners/residents that live in a relationship that has been described as "a little democratic sub society of necessity" (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 536 [1990] [citation and internal quotation marks omitted]). Lease ¶ 21 (a), literally read, appears to essentially include all alterations or changes, a very broad interpretation. Considering the language of the entire paragraph and the contract, and the type of agreement, clearly the parties' intentions were to protect the Co-op's building against changes that pose a risk of affecting building systems and structures unfavorably, as this could be detrimental to the value of the collectively owned Co-op or create safety and comfort issues for the shareholders/residents.

Plaintiff has not demonstrated that replacing the type of equipment involved here, which supplies heating and air conditioning to an entire apartment, and is not located within plaintiff's apartment, but on common space on the roof, is the same as replacing a household appliance.[4] In fact, the record reveals that the old equipment, with each of the three units weighing approximately 430 pounds, must be removed from hubs that lay on defendant's roof, and new equipment, the weight and size of which has not been established here, brought to the rooftop and anchored into the hubs. In addition, a connection would need to be made to the dedicated electrical system that, despite having been installed by plaintiff over 30 years ago, nevertheless is located in or on the Co-op's building or property. Moreover, plaintiff's expert does not

[4] A photograph shows that the three units are spaced out over what is not an insignificant portion of the roof.

adequately explain how the equipment will be hooked into the electrical system, and plaintiff does not describe the basis of his knowledge as to how this will be done. In any event, installing a large, undoubtedly heavy, electric-based system of this nature on a building's roof may affect the building's roof, structure or systems, and, while intended as a replacement of the old system/equipment, is a change or alteration, and not one so insignificant in scope, magnitude or nature that it would not constitute an alteration under Lease ¶ 21 (a).[5]

Furthermore, plaintiff claims entitlement to install the new equipment based on the Board's 1982 consent, but any permission granted then would have been limited to what was presented to the Board, and the parties' agreement at the time.[6] Drawing inferences in the non-moving party's favor, as is required on this motion, plaintiff has not demonstrated that the replacement units are like-kind, as he has not shown that the units are the same weight, or that the impact or burden on the electrical system or roof would be the same as the existing

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[5] "[A]bsent ambiguity, there [is] no reason to resort to contra proferentum," which has been called a "last resort" (*Schron v Troutman Saunders LLP,* 97 AD3d 87, 93 [1st Dept 2012], *affd* 20 NY3d 430 [2013]), or extrinsic evidence. In addition, the court notes that, drawing reasonable favorable inferences in favor of the non-moving defendant, Vaccaro's email message of October 17, 2011 may not be deemed an admission by defendant (Silver aff., exh. T; Vaccaro reply aff., ¶ 3).

[6] As the HVAC system was installed in 1982, with defendant's knowledge, the "board's knowing forbearance" may support a finding of waiver of the written approval requirement (*see Kiam v Park & 66th Corp.*, 66 AD3d 415, 416 [1st Dept 2009]; *Kenyon & Kenyon v Logany*, LLC, 33 AD3d 538, 538–539 [1st Dept 2006]). However, plaintiff's argument is that he has a right to replace the system because he was granted permission for the original installation, but he has not demonstrated the scope of permission granted, and an inference that it was temporally unlimited may not be drawn against the non-moving party on this record.

equipment, but only that the new system will fit into the existing roof hubs.[7] Plaintiff also does not demonstrate that the sound level is the same, or acceptable, or address whether or not the new system will cause additional or different vibrations.

Lease ¶ 18 does not aid plaintiff. This paragraph concerns the allocation of costs and risks, and its requirement that the tenant incur the cost or responsibility for replacements does not supersede the consent requirement of paragraph 21 (a).

To the extent that plaintiff may be arguing that his contact with the superintendent constituted permission for the 2011 installation, the argument is unpersuasive (*see Levin v 40 Fifth Ave. Corp.*, 24 AD3d 244, 244 [1st Dept 2005] [tenant's belief that superintendent was acting with cooperative's approval not reasonable where board's approval authority was unambiguous]). Drawing reasonable inferences in favor of the non-moving defendant, plaintiff demonstrates only that the building's managing agent gave him instruction, or information, regarding some Co-op requirements, not permission, on behalf of the Board or otherwise.

In addition, "[a] permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that [he or she] will suffer irreparable harm absent the injunction" (*Icy Splash Food & Beverage, Inc. v Henckel,* 14 AD3d 595, 596 [2d Dept 2005]). "Irreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient" (*L & M 353 Franklyn Ave., LLC v S. Land Dev., LLC*, 98 AD3d 721,

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[7] Plaintiff states that he believed that a copy of the contract from his installation contractor, and a letter from that contractor stating that the new units would have the same footprint as the old ones, answered defendant's questions. However, the materials plaintiff submits do not provide dimensions or weight of the units, and the word footprint has more than one definition. Plaintiff's counsel's assertion that the new units are the same weight is not admissible evidence where he does not state the basis of his knowledge.

722 [2d Dept 2012] [citation and internal quotation marks omitted]). While plaintiff asserts that his apartment cannot be adequately heated or cooled without the particular system that he seeks,[8] that such an apartment is devalued, and that his prior construction will be obsolete if he is unable to replace his current units with the new ones that he seeks to install, he submits no admissible evidence to support of any of these conclusory assertions. Therefore, plaintiff has not met his evidentiary burden to demonstrate irreparable harm. The declaration plaintiff seeks mimics the relief he seeks through an injunction, but as plaintiff has not demonstrated entitlement to summary judgment, and fact issues exist, plaintiff's motion is denied.

As plaintiff has not made a clear showing of danger of irreparable harm or probability of success on the merits, he also has not met the standard for preliminary injunctive relief (*Goldstone v Gracie Terrace Apt. Corp.*, 110 AD3d 101, 104-05 [1st Dept 2013]). Furthermore, a preliminary injunction is intended to maintain the status quo, and the relief that plaintiff seeks would improperly provide the ultimate relief requested (*see Olympic Tower Condominium v Cocoziello*, 306 AD2d 159, 160 [1st Dept 2003]; *see also Board of Mgrs. of Wharfside Condominium v Nehrich*, 73 AD3d 822, 824 [2d Dept 2010] [board not entitled to preliminary injunction compelling defendants to restore condominium unit to original condition where complaint sought same relief]; *St. Paul Fire & Mar. Ins. Co. v York Claims Serv.*, 308 AD2d 347, 349 [1st Dept 2003] [preliminary injunction should not be granted absent extraordinary circumstances if status quo would be disturbed and plaintiff would receive ultimate relief]).

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[8] Plaintiff's assertion, that the apartment cannot be adequately heated or cooled without the new system, is tempered by defendant's unrebutted showing that plaintiff did not accept an offer to remedy any issue that may exist with the building's heating system and that plaintiff has installed additional air-conditioning equipment.

Defendant's Motion for Summary Judgment

The Co-op moves for judgment dismissing the complaint on the ground that it was within its rights to stop plaintiff from installing the units because plaintiff did not obtain Board approval under the Lease and the Co-op's house rules (the House Rules) before attempting to install the equipment. Defendant argues that permission to install the HVAC units from the superintendent is not adequate, which has been addressed above, and that plaintiff is not permitted to do what he wishes with the portion of the common area of the roof, in terms of subsequent alterations, in perpetuity, without regard to the Lease and the House Rules.

As a threshold matter, in opposition, plaintiff raises various objections to defendant's submissions, such as Vaccaro's affidavit, including that Vaccaro does not state that the Board authorized him to submit it. Plaintiff cites to no authority to support his bald assertion that a corporation's president, in the regular course of his duties, may not submit an affidavit in a lawsuit. Plaintiff also argues that a portion of Vaccaro's affidavit is inadmissible because of an objection raised to one of plaintiff's interrogatories, but provides no support to demonstrate that plaintiff's remedy was other than to move to compel or preclude.[9]

Plaintiff correctly concludes that the provision in the House Rules upon which defendant relies does not apply, as it addresses window air conditioners and windows. Defendant's other assertions about the House Rules overall, and provisions in it that do not address the circumstances here, but other matters, such as planting, are unpersuasive and improperly raised

[9] Both sides object to what they contend is the other side's inclusion of inadmissible evidence. Of course, in determining whether or not moving burdens have been met, only admissible evidence will be considered (*Alvarez*, 68 NY2d at 324).

for the first time only in reply (*see Azzopardi v American Blower Corp.*, 192 AD2d 453, 454 [1st Dept 1993] ["the court should never even have considered arguments making their initial appearance in reply papers"]; *Ford v Weishaus*, 86 AD3d 421, 422 [1st Dept 2011]).

Plaintiff contends that the replacement of previously approved equipment does not constitute an alteration, or require Board approval, an issue which already has been determined in defendant's favor. Plaintiff argues that defendant is not entitled to summary judgment because it has singled out plaintiff as a shareholder, as other tenants that have installed air-conditioning or HVAC units, including on the roof, without Board approval or the execution of an alteration agreement. For example, plaintiff provides pictures of what he states is an HVAC system that his neighbors installed on common space. Plaintiff states that these shareholders necessarily ran electrical wiring to the system, and, therefore, cut at least one hole in the building's roof, but the Co-op did not require Board approval, or the execution of an alteration agreement, and has stated that it will work around the unit. Plaintiff asserts that defendant's document production demonstrates that, within the last thirty years, no other shareholder has been required to submit an alteration agreement or to obtain Board consent for installing, removing or replacing an air conditioner. As previously noted, defendant denied plaintiff's request to install the equipment.

Lease § 21 provides that consent for alterations "shall not be unreasonably withheld or delayed." Therefore, defendant's denial of plaintiff's application is not shielded by the business judgment rule (*Seven Park Ave. Corp. v Green*, 277 AD2d 123, 123 [1st Dept 2000]; *Rosenthal v One Hudson Park*, 269 AD2d 144, 145 [1st Dept 2000] [board preconditions imposed had to be reasonable and "were not sheltered from review by the business judgment rule"]), and must be

reviewed by the court under a reasonableness standard. Plaintiff raises a fact issue as to whether or not the board is treating plaintiff in a manner different from other shareholders who are similarly situated, and, on this record, whether or not other shareholders are similarly situated presents a fact issue.[10] Plaintiff also raises a fact issue as to whether or not the Board's conduct or decision was based on animus (*see e.g.* Garbuz aff., exhs. R, T, Y, Z), which is not indicative of either good faith or reasonableness (*cf. Fletcher v Dakota, Inc.*, 99 AD3d 43, 48 [1st Dept 2012] [evidence of arbitrary and malicious decision-making destroys business judgment rule shield]). As plaintiff has raised these fact issues, defendant's motion must be denied (*see Seven Park Ave. Corp.*, 277 AD2d at 123).

Defendant argues that it is entitled to summary judgment because plaintiff is barred from an award of equitable relief based on the doctrine of unclean hands, but that doctrine "is never used unless the plaintiff is guilty of immoral, unconscionable conduct and even then only when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct" (*National Distillers & Chem. Corp. v Seyopp Corp.*, 17 NY2d 12, 15-16 [1966] [citations and internal quotation marks omitted]; *Frymer v Bell*, 99 AD2d 91, 96 [1st Dept 1984] [same]). Defendant has not made this showing by arguing that plaintiff violated the Lease by attempting to install the units, or other air-conditioning equipment, especially as defendant essentially acknowledges that it has no objection to the concept of plaintiff having some type of system, and plaintiff has raised a fact issue as to

[10] Disregarded is plaintiff's comparison with standard, window air conditioners, which are not similar enough to the central air-conditioning system that plaintiff seeks to install. The record reveals that plaintiff may have submitted documents to the Board concerning the units' dimensions and weight that were not submitted here.

defendant's conduct concerning other tenants who may have installed such equipment on the Co-op's common space without approval.

Plaintiff's motion to amend the caption is granted without opposition.

In light of the foregoing, it is

ORDERED that plaintiff's motion for a preliminary injunction and to amend the caption (sequence number 001) is granted but only to the extent that the action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------X
RICHARD SILVER,

Plaintiff,

-against-

MURRAY HOUSE OWNERS CORP.,

Defendant.
----------X

and is otherwise denied; and it is further

ORDERED that defendant's motion for summary judgment and plaintiff's cross-motion for summary judgment (sequence number 002) are denied; and it is further

ORDERED that a copy of this order with notice of entry shall also be served upon the Clerk of the Court and the Clerk of the Trial Support Office (Room 158).

Dated: 10/12/13

J.S.C.

HON. ANIL C. SINGH
SUPREME COURT JUSTICE