Broome JV LLC v Goldstein
2014 NY Slip Op 30439(U)
February 21, 2014
Supreme Court, New York County
Docket Number: 110852/2011
Judge: Anil C. Singh
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[* 1] RECEIVED ON 2/26/2014

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

PART 61

Index Number : 110852/2011
BROOME JV LLC
VS.
GOLDSTEIN, MICHAEL
SEQUENCE NUMBER : 001
OTHER RELIEFS

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). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). 3

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

FILED
FEB 26 2014
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 2/21/14

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
NEW YORK COUNTY - - PART 61

BROOME JV LLC and TAVROS MERCER OWNER, LLC,

Plaintiffs,

- against -

MICHAEL GOLDSTEIN and INFOMAX TRADING CORP.,

Defendants.

Index No. 110852/11

DECISION/ORDER

FILED
SEP 26 2014
NEW YORK
COUNTY CLERK'S OFFICE

HON. ANIL C. SINGH, J.:

In this action, plaintiffs Broome JV LLC (Broome) and Tavros Mercer Owner, LLC (Tavros), owners of a nine-story building located at 450 Broome Street, New York, New York (the building or 450 Broome), seek a declaratory judgment that they are entitled to exclusive use of the building's roof, and that defendants Michael Goldstein (Goldstein), a tenant in the building, and his company, Infomax Trading Corp. (Infomax), have no right to use the roof and must remove any of their property from it. Defendant Goldstein moves for summary judgment dismissing the complaint and declaring that he is entitled to continue to use the roof as he has been doing. Plaintiffs cross move for summary judgment for the relief sought in the complaint.

BACKGROUND

The material facts of this case are largely undisputed. Goldstein has resided in the building for about 40 years, since he, in or around 1973 or 1974, with the permission of the then

building owner, converted the top floor unit of the building from a factory space into a residential studio. Goldstein Aff. in Support of Defendants' Motion (Goldstein Aff.), ¶ 5; Goldstein Dep., Ex. Y to Gallaudet Aff. in Opposition to Defendants' Motion (Gallaudet Aff.), at 15-17; Danzger Dep., Ex. X to Gallaudet Aff., at 11-12. When Goldstein moved into the building, it was zoned for light industry, but, like numerous other buildings in the Soho area in the 1970s, it gradually was occupied by residential tenants, primarily artists. Danzger Dep., at 4-5. The building now has, and for many years has had, a commercial space on the ground floor and eight floors of residential units above. Danzger Aff. in Opposition to Defendants' Motion (Danzger Aff.), ¶ 4; Goldstein Aff., ¶ 4.

According to Goldstein, soon after he moved into the building, with his then girlfriend, who left about a year later, and their young daughter, he began using the roof of the building as a play area for his daughter. Goldstein Aff., ¶ 5; Goldstein Dep., at 18, 20. Within the first few years, he covered the roof with Astroturf, brought up potted plants and chairs, and set up a sand box and wading pool. Goldstein Aff., ¶ 5; Goldstein Dep., at 21. In September 1974, Goldstein signed a two-year lease with then owner 450 Broome LLC a/k/a DSL Company (DSL) for the ninth floor loft. *See* Lease, Ex. B to Danzger Aff. The 1974 lease did not expressly prohibit or permit access to or use of the roof.

[* 4]

Id.

In 1977, Goldstein's wife, Nancy, moved in, and they had two children together. Goldstein Aff., ¶ 6. Over the ensuing years, Goldstein and his family regularly spent time on the roof, especially in good weather, eating meals, socializing, and using it as a playground for the children. *Id.* Goldstein planted trees, flowers and shrubs, creating an elaborate garden; ran water, electric, and phone service to the roof and installed outdoor lighting; added more furniture and cooking equipment and a larger pool; and eventually placed a shed on the roof, which contained a refrigerator and a television. *Id.*; Goldstein Dep., at 47-49. He considered the roof to be part of his space, and he maintained and repaired it at his expense. Goldstein Aff., ¶ 7.

Goldstein attests that, from the beginning of his tenancy, he used the roof with the knowledge of the landlord. *Id.*, ¶¶ 5-6. He asserts that no other tenants had possessions on the roof or, with one exception, used the roof without asking his permission. *Id.*, ¶ 7. Goldstein also states that, while access to the roof was through a door at the top of a hallway stairs, in the early 1990s he repaired the broken bolt on the door, replaced it with a "panic bar" and an alarm system, and maintained and distributed keys to the alarm. *Id.*, ¶ 8. Only he and the building superintendent held keys to the door, and other tenants needed to request a key from him if they wanted to go onto the

roof. Goldstein Dep., at 40-41. In affidavits submitted by four tenants in the building, three of them attest that Goldstein always had exclusive use of the roof; the fourth tenant stated that he used the roof, without Goldstein's permission, until 1993, when Goldstein obtained a lease for exclusive use of the roof. *See* Affidavits of Charles Carson, Lewis Stein, Richard Stackhouse, Marcia Scanlon, annexed to Goldstein Aff.

In 1982, in response to the ongoing conversion of industrial spaces to residential lofts in Soho, the Loft Law was enacted, which granted tenants rent-regulated status, and required that building owners, in exchange for rent increases, perform certain work to legalize their buildings for residential use. *See* Gallaudet Aff., ¶ 7 n 1; Goldstein Aff., ¶ 9. Buildings covered by the Loft Law, known as Interim Multiple Dwellings (IMDs), became subject to the Rent Stabilization Law once they were fully legalized for residential use. After the Loft Law was enacted, 450 Broome was registered with the New York City Loft Board as an IMD (Gallaudet Aff., ¶ 7; Danzger Aff., ¶ 8), and the owner began the process of obtaining a certificate of occupancy. A residential certificate of occupancy eventually was issued to the owner in 1998. *See* Certificate of Occupancy, Ex. C to Goldstein Aff. In November 1998, pursuant to the requirements of the Loft Law, DSL offered Goldstein a two-year lease. Danzger Aff., ¶ 10; *see* Apartment Lease, Ex. E to Danzger Aff. While the lease

included a provision prohibiting use of the roof, Goldstein continued to use the roof, under the terms of a 1993 written agreement with DSL.

In an affidavit submitted on behalf of plaintiffs, Joshua Danzger (Danzger), managing member of former building owner DSL, acknowledges that he knew that Goldstein was using the roof, but claims that he objected to the use. Danzger Aff., ¶¶ 6-7. Goldstein acknowledges that, sometime in 1992 or 1993, Danzger contacted him to demand that he discontinue use of the roof, but subsequently he and Danzger negotiated a written agreement permitting Goldstein to use the roof for a monthly fee. Goldstein Aff., ¶ 10; Danzger Aff., ¶ 9; *see* License Agreement (1993 agreement), Ex. D to Goldstein Aff. The 1993 agreement granted Goldstein exclusive use of the entire roof for three years, at $750 per month, and provided that Goldstein would maintain the roof and pay for repairs at his own expense, and would maintain liability insurance for the benefit of the landlord and hold the landlord harmless against any legal actions brought against the building or its owners as a result of Goldstein's use. Goldstein Aff., ¶ 10; Danzger Aff., ¶ 9; Danzger Dep., at 39-40. The agreement further provided that, if Goldstein's use was deemed by any government agency to be illegal, or required modification to make it legal and Goldstein refused to make the modification, the agreement would

automatically terminate. Goldstein Aff., ¶ 10. After the agreement expired, Goldstein continued to use, pay rent for, repair and maintain the roof. Goldstein Aff., ¶ 12.

By order of the Loft Board dated April 27, 2000, the initial legal rents were set for residential units in the building, the building was removed from the jurisdiction of the Loft Board, and the owner was directed to register the building with the New York State Department of Housing and Community Renewal (DHCR) and to offer Goldstein, and certain other tenants, a rent-stabilized lease. See Order, Ex. G to Goldstein Aff. Goldstein has submitted a copy of the initial DHCR apartment registration form for his apartment, 9W, which states it was filed on October 19, 2000, and in which "Roof" is identified as a service for which a separate charge is collected by the owner. *See* Initial Apartment Registration, Ex. H to Goldstein Aff., Box 13. For purposes of comparison, Goldstein also has submitted a copy of the initial registration form for apartment 4W, filed on the same date, which identifies no services for which a separate charge is collected.

In November 2002, Goldstein signed another three-year agreement, in the name of his company, Infomax,[1] to use the roof, at an increased monthly rent; the terms otherwise were the same

[1]Goldstein asserts that he does not know why the contract was in Infomax's name; Danzger testified that he assumed it was for Goldstein's tax purposes. Goldstein Aff., ¶ 15; Danzger Dep., at 19-20.

as the 1993 agreement. *See* License Agreement, Ex. J to Goldstein Aff. In December 2002, Danzger followed up the agreement with a letter, agreed to and signed by Goldstein, which set forth DSL's understanding that the roof and the ninth floor apartment were separate, independent areas, that the roof area was not covered by the Loft Law or Rent Stabilization Law, and that the roof agreement was separate; and the owner also requested that the rent for the roof and the apartment be paid separately. *See* Letter, Ex. K to Goldstein Aff. The roof agreement was renewed in November 2005 for another three years, with further rent increases, and Danzger again followed up with a letter, which was not signed by Goldstein, reiterating that the roof and apartment spaces were independent properties and the roof agreement was a separate, stand alone agreement. *See* License Agreement, Ex. L and Letter, Ex. M to Goldstein Aff.

DSL sold the building in 2007 to Mediterranean Sun Property, LLC., and in June 2009, ownership of the building was transferred to Nova American Soho, LLC. (Nova). Danzger Aff., ¶ 1. In July 2009, the Department of Buildings (DOB) issued a violation to Nova based on structures and "foliage resembling a forest" on the roof, and directed the owner to submit an engineer's report regarding the structural stability of the roof. *See* Order to Correct Violations, Ex. N to Goldstein Aff. By letter dated August 28, 2009, Nova informed Goldstein that it was terminating

his license to use the roof, and demanded that he remove any property on the roof. *See* Letter, Ex. O to Goldstein Aff. In response, Goldstein, through his attorney, asserted that he had a right to use the roof, and informed Nova that he had hired an engineer to resolve the DOB violation. *See* Letter, Ex. P to Goldstein Aff. Goldstein attests, without dispute, that he submitted the engineer's report to the DOB and nothing further occurred with respect to the violation. Goldstein Aff., ¶ 22. Nova subsequently refused to accept Goldstein's rent payments, "due to pending legal proceedings" (*see* Letter dated October 29, 2009, Ex. W to Gallaudet Aff.), and Goldstein apparently stopped paying, but continued to use and maintain the roof, without further objection from Nova.

The building was sold to plaintiffs in or around June 2011. Zecher Aff. in Opposition to Defendants' Motion, ¶ 1; Goldstein Aff., ¶ 23; *see* Deed, Ex. V to Goldstein Aff. Goldstein was told by the new owners to remove all his possessions from the roof because they were planning to use it as a staging area for facade repair work, and intended to then replace the whole roof. Goldstein Aff., ¶ 23. By notice of termination dated August 9, 2011, plaintiffs informed Goldstein that they were terminating his license to use the roof, effective August 29, 2011. *See* Ten Day Licensee Notice of Termination, Ex. R to Goldstein Aff. Plaintiffs then commenced the instant action in September 2011.

As of November 2011, Goldstein had removed all of his property from the roof. Goldstein Aff., ¶ 23.

DISCUSSION

It is well settled that to prevail on a motion for summary judgment, the movant must establish the cause of action or defense, by submitting evidentiary proof in admissible form, "sufficiently to warrant the court as a matter of law in directing judgment." CPLR 3212 (b); *see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Once such showing has been made, to defeat summary judgment, the opposing party must, also by submitting evidentiary proof in admissible form, "establish the existence of material issues of fact which require a trial of the action." *Alvarez*, 68 NY2d at 324; *see Zuckerman*, 49 NY2d at 562. In reviewing a motion for summary judgment, the evidence must be viewed in a light most favorable to the nonmoving party (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), and the motion must be denied if there is any doubt as to the existence of a triable issue of fact, or where the issue is "arguable." *See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). As has long been noted, the key to summary judgment resolution is "'issue-finding, rather than issue-determination.'" *Sillman*, 3 NY2d at 404 (internal citation omitted).

There is no dispute that Goldstein is a tenant in a rent-stabilized apartment, and is entitled, therefore, to the protections of the Rent Stabilization Law (RSL) (Administrative Code of the City of New York [Administrative Code] § 26-501 et seq.) and the Rent Stabilization Code (RSC) (9 NYCRR § 2520.1 et seq.). At issue is whether Goldstein's longtime use of the building's roof is a required, ancillary service under the RSL and the RSC, as Goldstein contends, or whether the building owner has the exclusive right to use the roof. Goldstein argues that his open and exclusive use of the roof, known to and permitted by a prior owner for many years, and the DHCR registration form filed at the time that the building converted to rent stabilized status, demonstrate that the roof was a service that may not be discontinued without DHCR approval. Plaintiffs contend that Goldstein's use was subject to a license, revocable at any time by the building owners, and, in any event, was a de minimis recreational use and not a required service.

The purpose of the RSL and RSC is to "provide[] safeguards against unreasonably high rent increases and, in general, protect[] tenants and the public interest." Administrative Code § 26-511 (c) (1). They also are intended "to tie rent increases to the owner's maintenance of services in order to maintain the quality and quantity of housing available to the citizens of New York." *Rubin v Eimicke*, 150 AD2d 697, 698 (2nd Dept 1989).

"Under Administrative Code § 26-514, an owner of a rent stabilized building must maintain all services that were provided when the building first became subject to rent stabilization." *Matter of Bluestar Properties, Inc. v New York State Div. of Hous. & Community Renewal*, 2011 WL 2138966, 2011 NY Misc LEXIS 2486, *13, 2011 NY Slip Op 31377(U), **10 (Sup Ct, NY County 2011), *affd* 91 AD3d 490 (1st Dept 2012); *see* 9 NYCRR § 2523.2.

Required services are defined by the RSC as

> "[t]hat space and those services which the owner was maintaining or was required to maintain on the applicable base dates . . . and any additional space or services provided or required to be provided thereafter by applicable law. These may include, but are not limited to, the following: repairs, decorating and maintenance, the furnishing of light, heat, hot and cold water, elevator services, janitorial services and removal of refuse."

9 NYCRR 2520.6 (r) (1).[2]

Under the RSC, required services also include "ancillary services," that is,

> "[t]hat space and those required services not contained within the individual housing accommodation which the owner was providing on the applicable base dates . . . and any additional space and services provided

[2]Defendants assert, and plaintiffs do not clearly contest, that the applicable base date in this case is April 27, 2000, the date of the Loft Board Order setting the initial legal regulated rent for the rent-stabilized units in the building. *See* Loft Board Order No. 2525, Ex. G to Goldstein Aff.

> or required to be provided thereafter by applicable law. These may include, but are not limited to, garage facilities, laundry facilities, recreational facilities, and security."

9 NYCRR 2520.6 (r) (3); *see generally Matter of Stratford Leasing Corp. v Gabel*, 17 AD3d 332 (1st Dept 1962), *affd* 13 NY2d 607 (1963) (discussing "essential" services under rent control). Required services may not be decreased or discontinued "without appropriate application" to DHCR. *Charles H. Greenthal & Co. v 301 E. 21st St. Tenants' Assn.*, 91 AD2d 934, 935 (1st Dept 1983); see *Matter of Lite View LLC v New York State Div. of Hous. & Community Renewal*, 30 Misc 3d 1224(A) (Sup Ct, NY County 2011), *affd* 97 AD3d 105 (2012); 9 NYCRR §§ 2202.21, 2522.4 (d). "If the owner fails to maintain these services, any tenant may seek an order from the DHCR . . . requiring the owner to maintain the service. Administrative Code § 26-514; 9 NYCRR § 2523.4 (a)." *Matter of Bluestar Properties, Inc.*, 2011 WL 2138966, 2011 NY Misc LEXIS 2486, at *14, 2011 NY Slip Op 31377(U), at **10.

"Use of ancillary space to a demised rent-stabilized premises may or may not be a required service depending on the facts and circumstances of a particular case." *Garza v 508 W. 112th St., Inc.*, 22 Misc 3d 920, 925 (Sup Ct, NY County 2008), *affd* 71 AD3d 567 (1st Dept 2010); *see Askinazy v Prince 156 Assoc., L.P.*, 2009 WL 2912384, 2009 NY Misc LEXIS 6100, *24, 2009 NY Slip Op 32009(U), **16 (Sup Ct, NY County 2009). Generally,

"[w]hat constitutes essential or required services within the meaning of the rent laws and whether they have been reduced are factual questions to be determined by DHCR." *Matter of 140 W. 57th St. Corp, v New York State Div. of Hous. & Community Renewal*, 260 AD2d 316, 317 (1st Dept 1999) (citations omitted); *see Matter of Oriental Blvd. Co. v New York City Conciliation & Appeals Bd.*, 92 AD2d 470 (1st Dept 1983), *affd* 60 NY2d 633; *Matter of Melohn v New York Div. of Hous. & Community Renewal*, 234 AD2d 23, 24 (1st Dept 1996).

Courts have commonly confirmed DHCR determinations that required ancillary services include garage facilities and parking spaces, laundry room facilities, courtyard and backyard use, a swimming pool, a community room, and mini-bus service. *See Matter of Peyton v PWV Acquisition LLC*, 101 AD3d 446 (1st Dept 2012), *affg* 35 Misc 3d 1207(A) (Sup Ct, NY County 2012) (parking spaces); *Matter of Northern Star Realty Co. v State of N.Y. Div. of Hous. & Community Renewal*, 62 AD3d 886 (2d Dept 2009) (garage); *Matter of 501 E. 87th St. Realty Co. v New York State Div. of Hous. & Community Renewal*, 22 AD3d 294 (1st Dept 2005) (swimming pool); *Matter of Llorente v New York State Div. of Hous. & Community Renewal*, 16 AD3d 105 (1st Dept 2005) (laundry facilities and backyard); *Matter of Classic Realty LLC v New York State Div. of Hous. & Community Renewal*, 298 AD2d 201 (1st Dept 2002) (mini-bus service); *Matter of Lydonville Prop. v New York*

State Div. of Hous. & Community Renewal, 287 AD2d 413 (1st Dept 2001) (garage); *Matter of 202 St., Inc. v New York State Div. of Hous. & Community Renewal*, 2013 WL 3994725, 2013 NY Misc LEXIS 3367; 2013 NY Slip Op 31742(U) (Sup Ct, Queens County 2013) (open green space used for recreation); *Matter of Bluestar Props., Inc.*, 2011 WL 2138966, 2011 NY Misc LEXIS 2486, 2011 NY Slip Op 31377(U) (community room); *Matter of Med, LLC v Division of Hous. & Community Renewal*, 2008 WL 5427237, 2008 NY Misc LEXIS 10172, 2008 NY Slip Op 33449(U) (Sup Ct, NY County 2008) (courtyard).

There are, however, certain reductions in service, first enumerated in a 1995 DHCR policy memorandum and later codified in the RSC, which are considered 'de minimis' in nature and do not rise to the level of a failure to maintain required services. *See* 9 NYCRR § 2523.4 (e); *Matter of Goldman v New York State Div. of Hous. & Community Renewal*, 31 AD3d 275, 276 (1st Dept 2006); *see generally* Warren Estis & Jeffrey Turkel, *Required Services: When Is a Discontinued Service de Minimis?*, NYLJ, Sept. 6, 2006, at 26, col 3. Section 2523.4 (e) of the RSC, as amended in 2000, sets out a list of 25 building-wide conditions, as well as 6 individual apartment conditions, that generally, but not determinatively, will be considered de minimis conditions, such as failure to provide air conditioning in the lobby, hallways and stairwells; stains on carpeting; removal of clotheslines; failure to wax floors; minor graffiti in building; missing light bulbs;

reduction of recreational equipment; decrease in number of staff. One of the specifically enumerated building-wide de minimis conditions is "discontinuance of recreational use [of a roof] (e.g., sunbathing) unless a lease clause provides for such service, or formal facilities (e.g., solarium) are provided by the owner." 9 NYCRR § 2523.4 (e) (19).

Courts accordingly have upheld DHCR determinations that building-wide recreational use of a roof, absent a lease provision or formal facilities, is not a required service. *See Matter of Goldman*, 31 AD3d at 276; *Matter of 98 Riverside Dr. Tenants Assn. v New York State Div. of Hous. & Community Renewal*, 2012 WL 4029788, 2012 NY Misc LEXIS 4295, *6, 2012 NY Slip Op 32299(U), **5. In contrast, courts and the DHCR have reached varying conclusions as to whether use of a roof or other ancillary space by an individual tenant is a required service. *See e.g. Garza*, 22 Misc 3d 920 (roof terrace was ancillary to tenancy); *Meirowitz v New York State Div. of Hous. & Community Renewal*, 28 AD3d 350 (1st Dept 2006) (backyard, accessed only through window, did not constitute a service); *Matter of Llorente*, 16 AD3d 105 (backyard use continuously provided was required service); *Jossel v Filicori*, 235 AD2d 205 (1st Dept 1997) (no right to use roof where tenant acknowledged use was impermissible); *Askinazy*, 2009 WL 2912384, 2009 NY Misc LEXIS 6100, 2009 NY Slip Op 32009(U) (backyard use not exclusive, not

part of lease, not registered, was not required service); *Eklund v Bunyan*, Sup Ct, NY County, Dec. 11, 2002, Madden, J., Index No. 401853/02 (tenant had right to continued use of roof above apartment); *see also Murphy v Vivian Realty Co.*, 199 AD2d 192 (1st Dept 1993) (tenant had no right to use roof beyond limited use allowed in lease).

In *Garza*, the trial court set out some factors to consider when determining whether an individual tenant's use of a roof, or other ancillary space, is a required service:

> "Important considerations include: the point of access; the exclusivity of the use, and the customary use of the space over a long period of time. Access from a door within an apartment is consistent with a required service, while access through a window is not. Exclusive use is consistent with a required service, while an incidental building wide access is not. Prolonged customary use is consistent with a required service under a lease."

22 Misc 3d at 925 (citations omitted); *see Askinazy*, 2009 WL 2912384, 2009 NY Misc LEXIS 6100, at *24, 2009 NY Slip Op 32009(U), at **16. The decision in *Garza*, as in other cases involving an individual tenant's right to use roof space, was based, in large part, on a finding that the space was intended to be part of the leased premises, considering the reference to a terrace in the lease, the tenants' access through doors in the apartment, as well as the tenants' open and exclusive use. 22 Misc 3d at 927. Thus, the court found, use of the roof as a

terrace "was ancillary to the tenancy." *Id.* at 926. Similarly, in *Conforti v Goradia* (234 AD2d 237 [1st Dept 1996]), the court found that the tenant had a continued right to use a roof area, appurtenant to his penthouse apartment, and as defined by a wooden deck in existence prior to his tenancy, as part of the leased premises. *See also Prospect Owners Corp. v Sandmeyer*, 62 AD3d 601 (1st Dept 2009) (roof use not exclusive, not part of lease and subject to revocable license); *Matter of 1409 Second Ave. Corp.*, NY St. Div. of Hous. & Community Renewal, Admin. Rev. Dckt. No. RA410043-RO (Sept. 18, 2003) (18 year use, with permission, of roof outside apartment, was required service, as an integral part of tenancy); *Rubin v Glasner*, NYLJ, Aug. 2, 2002, at 19, col 3 (Civ Ct, NY County 2002) (20 year open use of roof without objection created presumption that roof was included in leasehold); *Eklund*, Sup Ct, NY County, Index No. 401853/02 (tenant has right to continue exclusive use of roof above apartment as integral part of tenancy).

In this case, the roof was above, not adjacent to, Goldstein's apartment and was not accessed from inside his apartment. The lease to the apartment did not include the roof as part of the leased premises. There also was no reference to roof access or use in Goldstein's earliest lease, and, at least in one of the later leases, roof use was expressly prohibited. Roof use nonetheless was expressly permitted prior to April 2000

by a previous owner, pursuant to several written leases, with the understanding that these agreements were separate from the leases for the apartment, and the roof was not part of the leased premises. *See* Letters, Exs. K, M to Goldstein Aff. There is, therefore, "no ambiguity as to whether the space is included in the leased premises . . . [and] "the only reasonable conclusion is that the parties did not intend the . . . roof to be included in the leased premises." *Prospect Owners Corp.*, 62 AD3d at 602, 603.

Plaintiffs also argue that the written agreements between Goldstein and the prior owner clearly show that he had only a revocable license to use the roof. "A license connotes use and occupancy of a grantor's premises while a lease connotes exclusive possession of a designated space, subject to rights specifically reserved by a lessor." *Garza*, 22 Misc 3d at 924, citing *American Jewish Theatre v Roundabout Theatre Co.*, 203 AD2d 155 (1st Dept 1994); *see Prospect Owners Corp.*, 62 AD3d at 602. What determines whether an agreement is a license or lease, however, "is not its characterization or the technical language used in the instrument, but rather the manifest intention of the parties." *American Jewish Theatre*, 203 AD2d at 156 (citations omitted). "A document calling itself a 'license' is still a lease if it grants not merely a revocable right to be exercised over the grantor's land without possessing any interest therein

but the exclusive right to use and occupy that land." *Miller v City of New York*, 15 NY2d 34, 38 (1964); *see G.G.A., Inc. v Amsterdam Ave. Investor, LLC*, 19 Misc 3d 1124(A) (Sup Ct, NY County 2008).

Whether there was a license or a lease here, however, does not end the inquiry into whether roof access must be maintained as a required service, and the court, therefore, need not reach the issue of whether the written agreements were licenses or leases. *See Prospect Owners Corp.*, 62 AD3d at 603 (after finding use of roof adjacent to tenant's apartment was not part of leasehold and use was by license, court deferred issue of whether roof access was a required service under RSC to DHCR); *see also Peyton*, 35 Misc 3d 1207(A). There is no dispute that, until 2011, Goldstein made continuous, and extensive, use of the roof, with the knowledge of, and, at least until 2009, little or no objection by the owner. The written agreements between Goldstein and the prior owner reflect that his use of the roof was to the exclusion of all other tenants, and that he maintained and repaired the roof at his own expense. Four tenants submit statements attesting that, at least from 1993 forward, Goldstein had exclusive use of the roof, and that they did not go onto the roof without his permission. While the owner also had keys to the roof, Danzger testified that, over the approximately 30 years that he owned the building, he was on the roof about 20 times.

Danzger Aff., ¶ 12. *Compare Matter of Burton*, OATH Index No. 1934/10 (June 30, 2010 [Loft Bd. Dkt. No. TM-0068]) (in similar case under Loft Law, no right to continued use of roof where no credible evidence of an agreement, tenant did not maintain roof, and use was shared with other tenants).

Goldstein submits a copy of the initial DHCR apartment registration form he received, which indicates that the roof was a service for which the owner collected a separate charge. *See* Initial Apartment Registration, Ex. H to Goldstein Aff., Box. 13. The RSC requires that such form be submitted to DHCR, and the former owner testified that, to the best of his knowledge, it was. Danzger Dep., at 44-45; *see* DSL Letter, Ex. H to Goldstein Aff. When shown the document, Danzger testified that his son likely filled out the form, or it was done by a service that he had used. Danzger Dep., at 43-44. Although plaintiffs argue that DHCR records obtained during this litigation show that, as of March 12, 2012, there were no services on file for Goldstein's apartment (*see* Registration Apartment Information, Ex. V to Gallaudet Aff.), DHCR records similarly indicate there were no building-wide services being provided (*see id.*, at 4), which plaintiffs do not claim to be the case.

Additionally, and not incidentally, Goldstein's use of the roof over the years clearly was, as his attorney described it, "de maximus." *See Garza*, 22 Misc 3d at 928; *Eklund*, Sup Ct, NY

County, Index No. 401853/02, at 5 (use of roof as recreation area with plants, trees, barbeque, table and chairs is not a minor use). "The RSC expressly recognizes that there may be and allows for cases where the facts are inconsistent with a conclusion that recreational use of the roof is a de minimis service." *Garza*, 22 Misc 3d at 928. Under the circumstances, the court finds that the issue of whether Goldstein's roof use is a required service is a matter more properly addressed in the first instance by DHCR, the agency authorized by the RSL and RSC to determine what constitutes a required service. *See Prospect Owners Corp.*, 62 AD3d at 603; *Peyton*, 35 Misc 3d 1207(A).

"Under the doctrine of primary jurisdiction, the court, while not without authority to adjudicate the dispute, declines as a matter of discretion to do so in order that the agency may have the initial opportunity to address an issue which is within the area of its expertise, and the court may thus have the benefit of the agency's wisdom before it addresses the issue." *Matter of Rockaway One Co. v Wiggins*, 35 AD3d 36, 42 (2d Dept 2006), *citing Capital Tel. Co. v Pattersonville Tel. Co.*, 56 NY2d 11, 22 (1982); *see 150 Greenway Terrace, L.L.C. v Gole*, 37 AD3d 792 (2d Dept 2007); *Wong v Gouverneur Gardens Hous. Corp.*, 308 AD2d 301 (1st Dept 2003); *Davis v Waterside Hous. Co.*, 274 AD2d 318 (1st Dept 2000); *Nasaw v Jemrock Realty Co.*, 225 AD2d 385, 386 (1st Dept 1996). In the instant context, as courts have

repeatedly found, "[t]he initial determination of what constitutes an essential [or required] service . . . is a matter appropriately reserved to the administrative agencies, which have the necessary expertise and are best equipped to dispose of the issue." *Charles H. Greenthal & Co.*, 91 AD2d at 935; *Peyton*, 35 Misc 3d 1207(A); *Matter of Lite View LLC*, 30 Misc 3d 1224(A); *Rubin*, 150 AD2d at 698; *Abramowitz v Woodner*, NYLJ, July 17, 1991, at 22, col 2 (Sup Ct, NY County 1991) (court concluded storage room was not essential service but may be ancillary and issue should go to DHCR); *see also Davidson v 506 E. 88th St. LLC*, 2008 WL 293052, 2008 NY Misc LEXIS 8427, 2008 NY Slip Op 30246(U) (Sup Ct, NY County 2008) (tenant's entitlement to exclusive use of garden implicit in DHCR determination but parties should go to DHCR for clarification or ruling; injunction granted); *McMahon v Vachon*, NYLJ, June 13, 1989, at 23, col 3 (App Term 2d & 11th Jud Dist 1988) (where tenant had separate lease for space in building on same floor as apartment, holdover proceeding stayed for DHCR to determine whether separately rented space was a required ancillary service).

It is accordingly

ORDERED that the motion and cross motion for summary judgment are denied and the action is stayed pending a determination by DHCR; and it is further

ORDERED that the parties are directed to submit the issue of

whether the roof is a required service to DHCR within 60 days of entry of this order.

Dated: 2/21/14

ENTER:

HON. ANIL SINGH, J.S.C.

HON. ANIL C. SINGH
SUPREME COURT JUSTICE

FILED

FEB 26 2014

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