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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

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HERBERT ROSE AND ANNE ROSE,

Plaintiffs,

DECISION & ORDER
Index No. 100671/2012

- against-

115 TENANTS CORP.,

Defendant.

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KENNEY, J.S.C.:

This declaratory judgment action involves a dispute between the plaintiffs, who are residential cooperative shareholders, and the defendant cooperative corporation, over how much of the roof adjoining plaintiffs' penthouse apartment is allocated for the plaintiffs' exclusive use, and whether the cooperative corporation may use some of that roof to construct a sun deck for all shareholders.

Plaintiffs Herbert Rose (Rose) and Anne Rose move for summary judgment, seeking declaratory, and permanent injunctive relief, as well as attorney's fees.

Defendant cross-moves to dismiss the complaint, declare in its favor, and award it attorney's fees.

Plaintiffs own 164 shares in the defendant cooperative corporation, which owns the residential apartment building at 115 East 90th Street in Manhattan (the Building). Pursuant to the terms of an October 29, 1993 proprietary lease (the Lease, exhibit A to Salcedo affirmation), plaintiffs are the tenants of what is

described as "PHN" or Penthouse North Unit (the Apartment), a 242-square-foot studio apartment with a door providing roof access. The building contains one other penthouse apartment, which also has an adjoining roof. It is undisputed that the other penthouse apartment has exclusive use of its adjoining roof, pursuant to identical operative language in its proprietary lease.

The roof outside the Apartment is approximately 1,675 square feet, including the space allocated to building components (Samman affirmation, ¶ 4).

The Lease provides in paragraph 7:

> "[if] the apartment includes a . . . portion of the roof adjoining a penthouse, the Lessee shall have and enjoy the exclusive use of . . . that portion of the roof appurtenant to the Penthouse"

(Lease at 6).

In a paragraph designated in the margin as, "demised premises," the Lease states, "as used herein "the apartment" means the room . . . together with . . . any closets, terrace, balconies, roof or portion thereof outside of said partitioned rooms, which are allocated exclusively to the occupant of the apartment" (*id.* at 1).

The Lease provides further that the tenants' use of the roof is subject under the Lease to the lessor's right to erect equipment on the roof, and that the lessee's use of the roof is subject to such regulations as the board shall prescribe. The Lease further requires the lessee to keep "the roof appurtenant to his apartment

free from snow, ice, leaves and other debris" (*id.* at 6).

Plaintiffs make no claim to exclusive use of the portions of the roof used for building components, inasmuch as those portions are not "allocated exclusively to the occupant of the apartment."

The issue on this motion is how much of the appurtenant roof is allocated to the apartment by the Lease, specifically, whether a portion of the newly refinished roof may be used by defendant to create a sundeck open to all shareholders. This proposed sundeck is part of the roof that is directly adjoining the Apartment.

The Appellate Division, First Department, construed the identical standard form language of a proprietary lease in *Gracie Terrace Apt. Corp. v Goldstone* (103 AD2d 699 [1st Dept 1984]), holding that the following language gave the tenants exclusive use of their adjoining roof:

> "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 applicable provisions of this lease and to the use of the terrace, balcony or roof by the Lessor to the extent herein permitted"

(*id.* at 700).

In *Goldstone*, there were other sections of the roof that were not adjoining, but to which the apartment had access and which the tenants had used exclusively for 10 years. As to those sections of the roof, questions of fact were presented.

By submitting the Lease, containing the provisions quoted

above, plaintiffs have demonstrated their prima facie entitlement to judgment as a matter of law, and a declaration that plaintiffs are entitled to exclusive use of all of the roof appurtenant to the Apartment, subject to emergency access and regulations, excepting those portions utilized for building components. The burden thus shifts to defendant to demonstrate the existence of a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

In support of its cross motion, and in opposition to plaintiffs' motion, defendant argues that plaintiffs are only entitled to exclusive use of the 400 square feet of roof space described in the "First Amendment to the Offering Plan" dated January 8, 1979 (the Amendment), which provides:

> "[i]f the present tenant of PHN does not purchase the shares allocated to PHN in accordance with this Amendment, then the Sponsor, or the Holder of Unsold Shares who acquires the shares allocated to that apartment, shall have the right to build a fireplace in the apartment and to construct, at their, or his, own cost and expense an enclosure as part of or contiguous to, PHN. Such structure may be constructed on not more than 400 square feet of the northeast quadrant of the roof. Such structure will include partially solid and partially glass walls and roof, a finished floor and baseboard radiation connected to the existing heating system in the building"

(exhibit C to Samman affirmation).

There is no allegation or evidence that the structure authorized by the Amendment was ever built.

Nothing in the language of the Amendment in any way addresses the use or allocation of the remaining 1,276 square feet of the

roof. Defendant's reliance on the Amendment is unavailing. The Amendment, by it terms, merely authorizes the construction of the Addition. It in no way limits the allocation of the roof. Nor would the Amendment prohibit the construction of a door from that authorized addition, had it ever been built, that would lead to the appurtenant roof. Defendants have not demonstrated that there is any inconsistency between the Lease and the offering plan.

Defendant also argues that plaintiffs have failed to come forward with any "competent, admissible evidence indicating that they are entitled to any roof space, let alone more than 400 square feet" (Samman affirmation, ¶ 15). This statement is palpably false in light of the plain language of the Lease which grants to the plaintiffs "exclusive use of . . . that portion of the roof appurtenant to the Penthouse" (Lease at 6).

The construction applied in *Goldstone* controls. The plain meaning of the unambiguous provisions of the Lease cited above is that, except for the portions of the 1,276 square feet of roof space used for building components, the Lease allocates the roof to the exclusive use of the occupants of PHN. Plaintiffs have demonstrated their prima facie entitlement to judgment as a matter of law, shifting the burden to defendant to demonstrate the existence of a genuine issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Defendant has failed to come forward with sufficient evidence

either to demonstrate its entitlement to judgment as a matter of law on its cross motion, or the existence of a question of fact in response to plaintiffs' motion.

Plaintiffs are entitled to attorney's fees pursuant to Real Property Law § 234, as the prevailing party because the lease "includes an attorneys' fees and expenses clause in favor of the [lessor]"

(*Graham Ct. Owners Corp. v Taylor*, 24 NY3d 742, 749 [2015]).

Accordingly, it is

ORDERED that the motion for summary judgment of plaintiffs Herbert Rose and Anne Rose is granted, with costs and disbursements as taxed by the Clerk of the Court upon presentment of an appropriate bill of costs; and it is further

DECLARED that plaintiffs are entitled under the terms of the October 29, 1993 proprietary lease to the exclusive use of those portions of the roof adjoining apartment PHN that are not used for building components, subject to emergency access and such regulations as the cooperative corporation shall promulgate; and defendant is enjoined from interfering with plaintiffs' exclusive use of the roof, as set forth above, during the pendency of the proprietary lease and any extension thereof; and it is further

DECLARED that plaintiff is entitled to attorney's fees; and it is further

ORDERED that the cross motion for summary judgment (CPLR 3212)

by defendant 115 Tenants Corp. is denied in its entirety; and it is further

ORDERED that the issue of the amount of plaintiffs' reasonable attorney's fees is severed and is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that that portion of the plaintiff's action that seeks the recovery of attorney's fees is severed and the issue of the amount of reasonable attorney's fees plaintiffs may recover against the defendant is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the plaintiffs shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet[1], upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

ORDERED that the Clerk shall enter judgment accordingly.

Dated: February 24, 2016 E N T E R:

JOAN M. KENNEY, J.S.C.

[1]Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh under the "References" section of the "Courthouse Procedures" link).