SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 17

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GREAT JONES STUDIOS INC.,

Plaintiff,

- against -

HERBERT WELLS and VERA WELLS,

Defendants.

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DECISION AND ORDER

Index No. 653104/2015

HON. SHLOMO S. HAGLER, J.S.C.:

This dispute concerns the use of the roof at 55 Great Jones Street, New York, New York (the "Building") by defendants Herbert Wells ("Wells") and his wife, Vera Wells (together, "defendants"). In Motion Sequence No. 005, defendants move pursuant to CPLR 3212, for summary judgment dismissing the complaint, for summary judgment on their first, second and third counterclaims, and for their costs and expenses, including attorneys' fees. In Motion Sequence No. 006, plaintiff moves, pursuant to CPLR 3212, for summary judgment on the complaint and for dismissal of defendants' counterclaims, and for its costs and expenses, including attorneys' fees. Motion Sequence Nos. 005 and 006 are consolidated for disposition herein.

BACKGROUND

In December 1979, Wells purchased the seven-story commercial loft Building and converted it into a cooperative with six full-floor residential units and a ground floor commercial unit and basement (NY St Cts Electronic Filing ["NYSCEF"] Doc No. 158, Peter Goodman ["Goodman"] aff, Exhibit "A" at 7 and 41). Wells served as the sponsor and the selling agent on the conversion (*id.* at 1). Plaintiff cooperative corporation is the present owner of the Building.

The offering plan (the "Offering Plan") states, in relevant part, that "Unit #7 is offered with easement of exclusive use of substantial portions of the roof, exclusive of elevator bulkhead,

chimney, flue outlets, and other spaces which are reserved for maintenance. This exclusive easement space is estimated at about 700 square feet"[1] (NYSCEF Doc No. 158 at 7). The roof was accessible via a common interior staircase (*id.* at 67), and a gooseneck ladder at the rear fire escape (*id.* at 65). The architectural drawings in the Offering Plan depicted only two rooftop structures – a staircase/elevator bulkhead and a wood gravity water tank housed in a brick and metal enclosure or bulkhead (*id.* at 66 and 83). The total area of the roof is approximately 2,400 to 2,500 square feet (NYSCEF Doc No. 1, complaint ¶ 12; NYSCEF Doc No. 155, affirmation of Christopher Tumulty ["Tumulty"], Exhibit "D" [Wells tr] at 44).

The Offering Plan provided for the sale of 16 shares in the cooperative (NYSCEF Doc No. 158 at 33), with maintenance set at $287 a month for each share (*id.* at 11). With regards to possible changes in the price per share, the Offering Plan partially states:

> "The Sponsor reserves the right, with respect to any unit for which a Purchaser Agreement has not been executed, or for which a Purchase Agreement is in default, in order to meet possibly varying demands for sizes and types of units, or to meet particular requirements of prospective purchasers, or for any other reason, to change the number of units per floor by increasing or decreasing their size, or to change the size, layout and location . . ."

(*id.* at 10). If there were any unsold shares on the closing date of the Offering Plan, the sponsor would produce "a financially responsible individual person or persons . . . (hereinafter referred to as 'Holder of Unsold Shares') to whom all of the unsold shares will be issued and who will enter into proprietary leases for the units to which such shares are allocated" (*id.* at 33). The holder of unsold shares could "elect to become the occupant of the unit covered by his proprietary lease,

[1] The Offering Plan defendants submitted with their motion (NYSCEF Doc No. 183, Wells affirmation, Exhibit "C") varies slightly from the document plaintiff submitted (NYSCEF Doc No. 158). Defendants' exhibit contains a chart setting forth the square footage, purchase price and shares allocated to each unit (NYSCEF Doc No. 183 at 7). Plaintiff's version omits the page marked "4B" and contains an extra page with two floor plans (NYSCEF Doc No. 158 at 84). The page number totals for both documents differ from the 82-page Offering Plan filed with the complaint (NYSCEF Doc No. 2).

and, from the time that he becomes the occupant thereof, the Sponsor shall no longer be responsible [sic] for the performance of his proprietary lease" (*id.*).

Defendants represent that after Wells failed to sell Unit #7 (the "Unit"), which was the floor-through loft on the Building's uppermost floor, he took ownership of the three shares allocated to that Unit (NYSCEF Doc No. 180, Wells affirmation, ¶ 5). On March 16, 1981, Wells entered into a proprietary lease (the "Lease") for the Unit (NYSCEF Doc No. 160, Goodman aff, Exhibit "C" at 3), as the holder of unsold shares (NYSCEF Doc No. 180, ¶ 5). The Lease defines the "apartment" as "the rooms in the building as partitioned on the date of the execution of this lease designated by the above-stated apartment number, together with their appurtenances and fixtures and any closets, terraces, balconies, roof, or portion thereof outside of said partitioned rooms, which are allocated exclusively to the occupant of the apartment" (NYSCEF Doc No. 160 at 3). The Lease also provides in paragraph 7, titled "Penthouses, Terraces and Balconies," 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 applicable provisions of this lease and to the use of the terrace, balcony, or roof by the Lessor to the extent herein permitted. The lessee's use thereof shall be subject to such regulations as may, from time to time, be prescribed by the Directors. The Lessor shall have the right to erect equipment on the roof, including radio and television aerials and antennas, for its use and for the use of the lessees in the building and shall have the right of access thereto for such installations and for the repair thereof. The Lessee shall keep the terrace, balcony, or portion of the roof appurtenant to his apartment clean and free from snow, ice, leaves and other debris and shall maintain all screens and drain boxes in good condition. No 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. No cooking shall be permitted on any terraces, balconies or the roof of the building, nor shall the walls thereof be painted by the Lessee without the prior written approval of the Lessor. Any planting or other structures erected by the Lessee or his predecessor in interest may be removed and restored by the Lessor at the expense of the

> Lessee for the purpose of repairs, upkeep or maintenance of the building"

(NYSCEF Doc No. 160 at 7). Typed beneath the preprinted language is the sentence, "*7th floor tenant has exclusive use of roof area" (*id.*). Rule 29 of plaintiff's house rules (the "House Rules"), which were incorporated into the Lease (NYSCEF Doc No. 160 at 8-9), states that "No Lessee shall install any plantings on any terrace, balcony or roof without the prior written approval of the Lessor" (NYSCEF Doc No. 161, Goodman aff, Exhibit "C" at 4). A breach of a House Rule constitutes a default under the Lease (NYSCEF Doc No. 160 at 9).

As for alterations, paragraph 21 of the Lease states, in pertinent part:

> "21. (a) The Lessee shall not without first obtaining the written consent of the lessor, which consent shall not be unreasonably withheld, 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, writing 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 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.
> (b) Without Lessor's written consent, the Lessee shall not remove any fixtures, appliances, additions or improvements from the apartment except as hereinafter provided . . ."

(NYSCEF Doc No. 160 at 14-15). Inserted beneath the preprinted language are the following typed sentences:

> "*Each 7th floor tenant shall have an easement with exclusive use of substantial portions of the roof, exclusive of elevator bulkhead, chimney, flue outlets, and other spaces which are reserved for maintenance.
> The 7th floor tenant shall be responsible for any damage to the roof area over which he has exclusive use. The cooperative corporation will be responsible only for normal maintenance and repairs"

(*id.* at 14).

Between 1981 and 1984, Wells undertook several alterations to the Unit. He installed a spiral staircase through the water tank bulkhead to provide direct access to the roof and five skylights (NYSCEF Doc No. 180, ¶ 5). At that time, the water tank was no longer in use (NYSCEF Doc No. 156, Tumulty affirmation, Exhibit "E" at 2). Wells demolished the northwest-facing metal walls and doorway of the water tank bulkhead, attached a greenhouse extension to the bulkhead, and covered the extension with a plywood roof (NYSCEF Doc No. 155 at 71 and 73). He built an 8-foot by 16-foot wood deck in front of the greenhouse (*id.* at 148-149). He tarred the brick walls of the water tank bulkhead and the elevator bulkhead, applied sealant to the camelback tiles at the parapets, and patched the roof as needed (NYSCEF Doc No. 156 at 2-3).

Wells and his wife moved into the Unit in 1984 (NYSCEF Doc No. 180, ¶ 6; NYSCEF Doc No. 155 at 92), after which they undertook additional work.[2] In 1988, Wells built a second 12-foot by 12-foot elevated wood deck from the greenhouse to the staircase bulkhead; the deck sat on top of footings cut into the roof for support (NYSCEF Doc No. 155 at 150-151). Wells testified that he applied cement or rubberized roofing material over several missing or cracked camelback tiles (*id.* at 112-113). Between 2001 and 2002, Wells removed the original camelback tiles and replaced them with poured concrete capstones (*id.* at 117-119). Wells explained that he built five-foot long wood planter boxes and bolted them to the top of the new capstones (*id.* at 120 and 122), and set up a water irrigation system across each planter (*id.* at 124 and 163). He drilled weep holes on the roof side for excess water runoff (*id.* at 122-123). Wells testified that he removed the greenhouse and replaced it with a wood-framed, wood- and glass-enclosed penthouse (*id.* at 131, 145 and 156-157). Between 2001 and 2003, Wells outfitted the disused water tank bulkhead with a kitchen, bathroom, and electricity (NYSCEF Doc No. 156 at 3). After removing the two wood

[2] At his deposition, Wells was unable to recall the specific dates when he performed the work, although defendants admit the work took place between 1984 and 2009 (NYSCEF Doc No. 156 at 2-3).

decks in 2002 so that a contractor could lay down a new torch down roof (NYSCEF Doc No. 155 at 165), Wells built a new, elevated wood deck supported on screw jack footings in 2009 (*id.* at 152). He installed a push-bar alarm on the door at the common stairway/elevator bulkhead that could only be disabled with his key (*id.* at 180).

Wells also testified that a metal company repairing the rear fire escape in the early 1980s had removed the gooseneck fire escape ladder because of rust (NYSCEF Doc No. 155 at 192). Wells further testified that due to break-ins at the Building, "two or three of us looked at the situation, we were bothered by the situation, and said we should remove it" (*id.*, lines 14-16). Wells believed that the first-floor and second-floor tenants at that time were involved in making the determination to remove the ladder (*id.* at 192-193).

Wells testified repeatedly that he did not inform, consult with or seek prior written consent from the Board for any of the work that he performed largely on his own, and that he did not sign an alteration agreement (NYSCEF Doc No. 155 at 96, 117-118, 140, 158 and 167). Similarly, he never retained the services of an architect or engineer (*id.* at 95, 115, 151 and 157). Wells explained that he never applied for a building permit from the New York City Department of Buildings ("DOB") (*id.* at 91, 95-96, 161-162, 167, and 209-210), because "it had been the culture in our co-op for 25 years to just do the work that was required to be done" (*id.* at 99, lines 20-23), and "[w]e didn't file the work that we did on our own spaces, those spaces that we thought to be our own" (*id.* at 158, lines 11-13). Wells expressed that he was not aware of the Lease provision requiring that alterations must comply with municipal agency laws (*id.* at 97). Regarding the capstone work, Wells testified that he "did not do any research with regards to whether it complied with any laws, I just used common sense, my common sense" (*id.* at 121, lines 11-14), even though he considered the capstone work to be a big job (*id.* at 140). As for the planter boxes, an unnamed architect told Wells that there was no DOB rule against placing a wood planter box on a parapet

(*id.* at 206). Wells also relied on an online housing brochure, testifying that "it was legal in New York City to have planters on your window sill in some laws, as long as they were affixed, and so I figured why not the top of the parapets, if they were well affixed, that was it" (*id.* at 125, lines 4-9).

Plaintiff's by-laws (the "By-Laws") state that the cooperative shall be governed by a board of directors comprised of at least three but no more than seven shareholders (the "Board") (NYSCEF Doc No. 159, Goodman aff, Exhibit "B" at 3). Each share is entitled to one vote (*id.* at 2). Wells served as the secretary or vice president from 1981 to 2016, and Vera Wells served as the treasurer in 1981, 1983 and 1984 (NYSCEF Doc No. 156 at 6). Wells affirmed that between 1981 to 2016, he was the director charged with investigating and dealing with all roof issues and that he "was performing repairs and improvements to the roof, for the benefit of the Coop and as an officer and director of the Coop" (NYSCF Doc No. 180, ¶ 8).

Plaintiff alleges that it learned of the illegal alterations, which had been completed without prior Board approval, in 2014 or 2015. By letter dated May 7, 2015, plaintiff's architect Jeffrey Kamen, R.A. ("Kamen") informed the Board that an inspection he performed for a report under Local Law 11 (New York City Administrative Code §§ 28-302.1 et seq.) had revealed "a number of conditions which we deemed unsafe and an imminent risk to the public" (NYSCEF Doc No. 168, Goodman aff, Exhibit "K" at 1). Kamen observed water damage from the planters above the east, west and rear parapets, separation of the rear wall of the penthouse from the parapet wall, and several unsecured, loose items on the roof (*id.*). In a letter dated June 15, 2015, a second architect, Robert Strong ("Strong"), wrote that the penthouse, wood deck, planter/capstone work and the conversion of the Building's domestic water system to a pump system required building permits, and that none of the improvements appeared on the plans DOB had approved for the conversion (NYSCEF Doc No. 162, Goodman aff, Exhibit "E" at 2). Strong wrote that the wood deck, which

covered more than 50% of the roof, was illegal under the governing building codes, and that the condition could subject plaintiff to a civil penalty (*id.*). Because the Building was located within an M1-5B zone, the penthouse may be illegal (*id.*). Strong recommended installing a new fire escape ladder as required under the Multiple Dwelling Law, a perimeter roof railing as required under the Building Code, and removing the lock on the door to the roof from the common stairway (*id.* at 1-2). Strong also wrote that, due to significant deterioration of the capstones, rain and other moisture, likely from the plant irrigation system, had caused water to seep into the parapets and destabilize the mortar at the top of the Building's masonry walls (*id.* at 2).

Defendants' architect Lester Tour ("Tour") described his observations of the roof in a letter addressed to Wells dated June 9, 2015. Significantly, Tour wrote that, of the alterations, "[w]e agree it is unsafe, not to code and is a risk, but we did note that the planters and brick wall appear to be sound and stable" (NYSCEF Doc No. 171, Goodman aff, Exhibit "N" at 1). Tour further wrote that, "[a]s also noted, the bolting used to affix the fencing and wood planter boxes allows water infiltration and over time will undermine the integrity of the wall and coping stones" (*id.*). He recommended the immediate removal of the "non-fire-rated" flower boxes and fencing, repair of the loose capstones, and installation of new guard rails (*id.* at 1-3). Tour also recommended removing the noncompliant penthouse structure, repairing a wall separation crack at the water tank bulkhead, and replacing the fire escape as per the Multiple Dwelling Law (*id.* at 2). With regards to the wood deck, the letter reads, "we agree with all the statements and as part of the remediation of the roof area and removal of all noncompliant structures and objects that need to be removed" (*id.*).

The Board subsequently adopted 12 resolutions requiring defendants to repair the roof and to execute an alteration agreement (NYSCEF Doc No. 172, Goodman aff, Exhibit "O" at 1-2).

After defendants failed to act, plaintiff issued a notice of default dated August 26, 2015 (NYSCEF Doc No. 173, Goodman aff, Exhibit "P" at 1).

Plaintiff commenced this action by filing a summons and complaint on September 14, 2015. The complaint asserts four causes of action for breach of contract and private nuisance and seeks injunctive relief and a declaratory judgment. Plaintiff alleges that the alterations have damaged the Building's masonry walls by compromising their structural integrity. In addition to asserting five affirmative defenses, defendants interposed five counterclaims for a declaratory judgment, breach of contract and breach of the covenant of quiet enjoyment.

Subsequent inspections after plaintiff brought this action have revealed significant water damage to the roof and the parapets. Strong observed cracked capstones, rusted steel rods at the parapets and deteriorated base flashing at a February 2016 inspection (NYSCEF Doc No. 163, Goodman aff, Exhibit "F" at 1). An October 2016 inspection revealed the lack of waterproofing or flashing between the capstones and parapet walls, deteriorated or missing flashing, exposed and corroded reinforcing bars in the capstones, loose and delaminated stucco (NYSCEF Doc No. 167, Goodman aff, Exhibit "J" at 1-2). In October 2017, plaintiff's structural engineer discovered that a rear spandrel beam was corroded and buckling (NYSCEF Doc No. 169, Goodman aff, Exhibit "L" at 1), and attributed the cause to the steel bolts that had been used to anchor the planters to the capstones (NYSCEF Doc No. 170, Goodman aff, Exhibit "M" at 1). The porous cement capstones allowed moisture to migrate downward into the parapet walls and onto the spandrel beam, which caused the beam to buckle under sustained loads (*id.* at 1-2). Plaintiff's contractor also discovered another opening through the roof (NYSCEF Doc No. 165 at 1).

The parties executed an alteration agreement dated December 17, 2015 (NYSCEF Doc No. 69 at 1). Defendants have removed the wood planters and deck, but have undertaken no other corrective work (NYSCEF Doc No. 157, Goodman aff, ¶ 14; NYSCEF Doc No. 180, ¶ 17).

Plaintiff has retained New Force Construction Corporation to replace and repair the capstones (NYSCEF Doc No. 174, Goodman aff, Exhibit "Q" at 1), and Rockledge Scaffold Corp. to furnish a sidewalk shed (NYSCEF Doc No. 175, Goodman aff, Exhibit "R" at 1). Defendants acknowledge that plaintiff has removed the capstones and penthouse and closed the opening to the water tank bulkhead (NYSCEF Doc No. 180, ¶ 17).

DISCUSSION

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*" (*Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

A. First Cause of Action for Breach of Contract

Plaintiff argues that defendants breached paragraphs 7, 18 (d) and 21 (a) of the Lease and rule 29 of the House Rules by engaging in alteration work without prior written consent from the Board and by completing alterations that violated the 1968 Building Code of the City of New York (Administrative Code of City of NY) §§ 27-147, 27-334 and 27-338 and Multiple Dwelling Law

§§ 53 and 277. In addition, all exterior surfaces must be watertight (*see* Rules of the City of NY Dept of Buildings [1 RCNY] § 103-04 [b] [3] [iii] [G]), and defendants' work has caused significant water and structural damage to the Building. Plaintiff seeks to recover its costs under several Lease provisions, including paragraph 28, along with punitive damages.

Defendants assert that plaintiff's claim for breach of contract is barred by the statute of limitations because its injuries accrued more than six years before it commenced this action. Defendants further argue that they cannot have breached the Lease because they are entitled to an easement of exclusive use of the roof.

Plaintiff, in reply, contends that defendants' second affirmative defense claiming the action is time-barred is deficient.

To prevail on a cause of action for breach of contract, a plaintiff must prove the existence of a contract, plaintiff's performance, defendant's breach, and damages (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). A breach of contract claim is subject to a six-year limitations (*see* CPLR 213 [2]; *ACE Sec. Corp. v DB Structured Prods., Inc.*, 112 AD3d 522, 522 [1st Dept 2013], *affd* 25 NY3d 581 [2015]), and the claim accrues "at the time of the breach, not on the date of discovery of the breach" (*Yarbro v Wells Fargo, N.A.*, 140 AD3d 668, 668 [1st Dept 2016], citing *Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]).

As an initial matter, defendants have adequately pled a statute of limitations defense. Plaintiff cites *Scholastic Inc. v Pace Plumbing Corp.* (129 AD3d 75 [1st Dept 2015]) for the proposition that an affirmative defense must give a plaintiff sufficient "notice of the transaction or occurrence at issue . . . [and] notice of the 'material elements' of the defense" (129 AD3d at 85, quoting CPLR 3013). There, the defendant asserted a statute of limitations defense with 15 other affirmative defenses in a single, boilerplate paragraph, even though several of the defenses were not germane to the action (*id.* at 79). The Court concluded that a plaintiff "ought [not] to be

required to sift through a boilerplate list of defenses, or 'be compelled to wade through a mass of verbiage and superfluous matter' . . . to divine which defenses might apply to the case" (*id.* [internal citation omitted]). In the present action, defendants' second affirmative defense reads, "[u]pon information and belief, the action is barred by the applicable statute of limitations" (NYSCEF Doc No. 153, Tumulty affirmation, Exhibit "B" [answer] ¶ 15). Unlike the boilerplate paragraph referenced in *Scholastic Inc.* (129 AD3d at 85), defendants' statement comports with CPLR 3014 because it is a "plain and concise" statement that is "separately stated and numbered." It also gives plaintiff sufficient notice of the defense (*see* CPLR 3013). Thus, it cannot be said that the defense was inadequately pled. Nor have defendants have waived the defense, as plaintiff posits. At any rate, the proper remedy in the event the defense was inadequately pled would be to allow defendants to cure the defect and amend their answer (*see Scholastic*, 129 AD3d at 81).

Turning to the merits of the defense, it is the defendant who bears the burden of proving that a claim is time-barred (*see Trustee of Columbia Univ. in City of N.Y. v Gwathmey Siegel & Assoc. Architects*, 167 AD2d 6, 11 [1st Dept 1991]). Although CPLR 213 (2) provides a six-year limitations period for breach of contract claims, "[t]he continuous wrong doctrine is an exception to the general rule" (*Henry v Bank of Am.*, 147 AD3d 599, 601 [1st Dept 2017]), and "'is usually employed where there is a series of continuing wrongs and serves to toll the running of a period of limitations to the date of the commission of the last wrongful act'" (*id.*, quoting *Selkirk v State of New York*, 249 AD2d 818, 819 [3d Dept 1998]). "The doctrine 'may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct. The distinction is between a single wrong that has continuing effects and a series of independent, distinct wrongs'" (*Henry*, 147 AD3d at 602, quoting *Doukas v Ballard*, 39 Misc 3d 1227[A], 2013 NY Slip Op 50776[U], *6 [Sup Ct, Suffolk County 2013], *affd* 135 AD3d 896 [2d Dept 2016]). Where a defendant's conduct allegedly violates a contractual obligation to comply with the law,

then a continuing wrong may be found (*see 1050 Tenants Corp. v Lapidus*, 289 AD2d 145, 146 [1st Dept 2001]). A party's violation of a zoning ordinance is also "a continuing violation of law so long as the unlawful operation continues" (*Marcus v Village of Mamaroneck*, 283 NY 325, 332 [1940]). Hence, application of the continuous wrong doctrine has salvaged a lessor's claim for breach of a proprietary lease against a lessee whose installation and ongoing use of an air conditioning unit may have violated the law (*see 1050 Tenants Corp.*, 289 AD2d at 147), and a sublessee's claim for breach of a lease where the sublessor was contractually obligated to "assure 'code compliance' with respect to the septic system" (*Stalis v Sugar Cr. Stores*, 295 AD2d 939, 941 [4th Dept 2002]).

Paragraph 18 (d) of the subject Lease imposes an ongoing contractual duty upon defendants to comply with all applicable laws regarding their use and occupancy of the Unit (NYSCEF Doc No. 160 at 13). Alterations must comply with all "governmental agencies having jurisdiction thereof" under paragraph 21 (a) (NYSCEF Doc No. 3 at 15). Because defendants have not addressed their compliance with these two Lease provisions, they have not met their burden of demonstrating that the breach of contract claim is time-barred.

As for an alleged breach, plaintiff maintains that the roof structures were illegal. First, Building Code § 27-147 requires a written permit for construction and alteration work, but Wells testified repeatedly that he never applied for a permit from or filed any plans with DOB.[3] Building Code § 27-334 requires a protective guard, such as parapet, railing, fence or a combination of them, no less than 3 feet, 6 inches high on the flat roof of every building more than 22 feet high. The planters did not qualify as a parapet, railing or fence, and Tour agreed that the planters and fencing were "not to code" (NYSCEF Doc No. 171 at 1). Building Code § 27-338 regulates the

[3] This section of the Building Code has been repealed (*see* Local Law No. 33 [2007] of City of NY § 8 [eff July 1, 2008]).

type of materials used in the construction of roof structures. More specifically, plaintiff argues that, with a Class 1 fireproof building such as the Building (NYSCEF Doc No. 158 at 60), the penthouse walls must be constructed of noncombustible materials under Building Code § 27-338 (a). Building Code § 27-338 (j) also states that miscellaneous roof structures, such as a platform, may be constructed of combustible material if they "do not cover more than twenty per cent of the roof area." Wells testified, and the inspections confirmed, that the exterior walls and roof of the penthouse were built, in part, of combustible wood, that the wood deck covered more than 50% of the roof, and that combustible debris had accumulated underneath the deck.

Next, Multiple Dwelling Law § 53 (6) mandates that a "balcony on the top story shall be provided with a stairway or a gooseneck ladder from such balcony to and above the roof and securely fastened thereto." Plaintiff submits that, subject to three exceptions, none of which are applicable, the removal of the gooseneck ladder constitutes a violation. Multiple Dwelling Law § 277 states that a building occupied for loft, commercial or manufacturing purposes before January 1, 1977 may be occupied as joint living-work quarters for artists or general residential purposes provided that "[n]o building converted pursuant to this article shall be enlarged, except where the underlying zoning district permits residential use" (Multiple Dwelling Law § 277 [7] [d]). Because the Building is located in an M1-5B zone, floor area must be removed elsewhere in the Building to accommodate the penthouse (NYSCEF Doc No. 162 at 2). Defendants created living space in the penthouse even though the certificate of occupancy did not permit rooftop occupancy.

Plaintiff has demonstrated that the improvements were not in compliance with Building Code §§ 27-147, 27-334 and 27-338 and Multiple Dwelling Law § 277, and had been completed without prior Board or DOB approval (*see 1050 Tenants*, 289 AD2d at 146). However, there are issues of fact exist related to the fire escape ladder and the perimeter railing. Wells testified that he had discussed the issue of removing the ladder with two other shareholders, both of whom

agreed that it ought to be removed. Wells also affirmed that "the Coop decided to remove the gooseneck fire estate ladder from the roof to the seventh floor" and that "[w]e were told by the local fire department that the ladder was not required since we were a fireproof building" (NYSCEF Doc No. 180, ¶ 10). Although plaintiff offered no evidence in rebuttal, defendants, likewise, offered no additional evidence in support other than Wells' statements. Whether a statement is "'self-serving' in the sense that it is incredible on its face . . . is an issue for the factfinder to resolve" (*Lewis v Rutkovsky*, 153 AD3d 450, 456 [1st Dept 2017]). Wells also maintained that the DOB-approved plans from the conversion depicted a rail around the perimeter of the roof, but "no such railing was ever installed"[4] (NYSCEF Doc No. 180, ¶ 7). John Kidd ("Kidd"), though, testified that he visited the roof the day after he purchased the ground floor commercial unit in 1992, and at that time, he saw a railing (NYSCEF Doc No. 237, Kidd tr at 25). These contradictions raise credibility issues which cannot be resolved on a motion for summary judgment (*see Encalada v McCarthy, Chachanover & Rosado, LLP*, 160 AD3d 475, 476 [1st Dept 2018]).

While defendants did not address the legality of the improvements, they contend that Wells, as the sponsor and as the holder of unsold shares, could take any action he wished related to the roof. Defendants rely on two clauses in the Offering Plan and plaintiff's by-laws ("By-Laws"). The Offering Plan reserves to the sponsor:

> "[t]he right, with respect to any unit for which a Purchaser Agreement has not been executed, or for which a Purchase Agreement is in default, in order to meet possibly varying demands for sizes and types of units, or to meet particular requirements of prospective purchasers, or for any other reason, to change the number of units per floor by increasing or decreasing their size, or to change the size, layout and location; but, such Sponsor, shall not have the right to reallot the total shares allocated to any of the floors offered for sale under said Plan"

[4] Incidentally, the task of installing the perimeter railing fell to the sponsor (NYSCEF Doc No 158 at 28).

(NYSCEF Doc No. 158 at 10).

Article V, Section 7, of the By-Laws reads:

> "Regrouping of Space. In respect of apartments for which the proprietary lease and shares issued to accompany the same are owned by the Sponsor named in the Plan of Cooperative Organization or the Sponsor's Nominee or the Sponsor's Assignee (who while entitled to occupy such apartments for his personal use does not do so), such Sponsor, Nominee, or Assignee may, upon the written consent of only the Managing Agent of the Building, change the number of such apartments by increasing or decreasing their size, or change the size, layout or location of any such apartment; but such Sponsor, Nominee, or Assignee shall not have the right to reallot the shares allocated to any of the apartments offered for sale under said Plan, unless such reallocation is designed to reflect a change in the value of the equity in the property attributable to the apartment or apartments to which the block of shares is being reallocated.
> Upon any regrouping of space in the building, the proprietary leases so affected, and the accompanying share certificates shall be surrendered, and there shall be executed and delivered in place thereof, respectively, a new proprietary lease for each separate apartment involved, and a new certificate for the number of shares so reallocated to each new proprietary lease"

(NYSCEF Doc No. 159 at 9; Wells affirmation in support, Exhibit "F"). Wells affirms that he was also the de facto managing agent for the Building (NYSCEF Doc No. 180, ¶ 5). Thus, defendants maintain that they cannot have breached the Lease and urge the court to dismiss the first cause of action.

Defendants' arguments lack merit. The fact that the Offering Plan and the By-Laws allowed the sponsor or its assignee to change the layout and size of an unsold unit did not dispense with the requirement that any such work must comply with the law. Under the Offering Plan, a holder of unsold shares must "fulfill his obligation under his proprietary lease" (NYSCEF Doc No. 158 at 33). Additionally, when defendants began occupying the Unit in 1984, they became "the occupant[s] thereof," thereby freeing the sponsor from his obligations under the Lease (NYSCEF Doc No. 158 at 33). Therefore, once Wells executed the Lease in 1981, defendants were obligated

to comply with its provisions, regardless of Wells' status as the sponsor or the holder of unsold shares. As such, defendants' attempt to escape liability on this ground fails.

Defendants also argue that the shareholders' awareness of the improvements implies that plaintiff tacitly approved the work or waived their requisite compliance under the Lease. Defendants, though, ignore the presence of the no-waiver provision in paragraph 26 of the Lease (*see Fairmont Tenants Corp. v Braff*, 162 AD3d 442, 442 [1st Dept 2018]; *River Park Residences, LP v Richman Plaza Garage Corp.*, 55 Misc 3d 140(A), 2017 NY Slip Op 50569[U] [App Term, 1st Dept 2017], *lv dismissed* 30 NY3d 1040 [2017] [rejecting the plaintiff's course of conduct argument in light of the no-waiver provision in the parties' lease]).

Nor is there merit to the contention that defendants bear no liability because Wells was the officer or director in charge of roof maintenance. The meeting minutes reveal that the Board met regularly to discuss expenditures and to vote on how to proceed with Building maintenance, no matter how minor the issue. For example, the minutes from April 4, 2000 indicate that the second-floor tenant at the time, Hiromi Honda ("Honda"), would purchase a broom and dust for cleaning the Building's lobby, and Kidd would purchase lightbulbs for the hallways (NYSCEF Doc No. 236, Wells affirmation in opposition, Exhibit "O" at 1). This practice comports with the language in article III, section 7 of the By-Laws, which states that "[t]he Board of Directors shall have discretionary power to prescribe the manner of maintaining and operating the apartment house . . ." (NYSCEF Doc No. 159 at 5), and nothing in the By-Laws permits an officer or director to unilaterally substitute his or her decision for the entire Board. The meeting minutes also reflect defendants' awareness of this rule. Indeed, the minutes from October 9, 1991 show that Wells raised the issue of coating the roof with aluminum asphalt (NYSCEF Doc No. 229 at 1), and the minutes from October 15, 2002 show that Wells raised the issue of replacing the roof (NYSCEF Doc No. 229 at 4). The minutes also reveal that, counter to defendants' claim of ownership of the

roof, the Board once declined defendants' offer to pay more than their share of the repair costs (NYSCEF Doc No. 180, ¶ 13).

Despite defendants' prior practice of discussing roof maintenance with the Board, Wells failed to inform the Board that he intended to remove and replace the capstones (NYSCEF Doc No. 155 at 117). Wells testified that he spoke to a contractor about repairing the roof, but he "figured it was cheaper if I did it than if the co-op did it. I mean you can lift off easily with the camelbacks, in most cases, not all cases" (*id.* at 116, lines 5-8). Wells, though, admitted that it was his understanding the "parapet walls and the bulkhead and the chimney" were not part of his easement of exclusive use (*id.* at 42 and 112). Whether the Board learned of the capstone modifications after they were completed does not invalidate the By-Law stating that the Board shall control operations. Moreover, defendants personally benefited from the installation of the planter boxes in which they grew decorative plants, herbs and vegetables (*id.* at 125).

Paragraph 7 of the Lease allows plaintiff to charge a lessee for the removal of any rooftop structure a lessee has installed (NYSCEF Doc No. 160 at 7). Paragraph 11 provides for indemnity for a lessee's default (*id.* at 8). Likewise, paragraphs 19 and 25 allow plaintiff to recover its expenses for any obligation a lessee fails to perform (*id.* at 14 and 17). Paragraph 28, titled "Reimbursement of Lessor's Expenses," also recites as follows:

> "If the Lessee shall at any time be in default hereunder and the Lessor shall incur any expense (whether paid or not) in performing acts which the Lessee is required to perform, or in instituting any action or proceeding based on such default, or defending, or asserting a counterclaim in, any action or proceeding brought by the Lessee, the expense thereof to the Lessor, including reasonable attorneys' fees and disbursements, shall be paid by the Lessee to the Lessor, on demand, as additional rent"

(*id.* at 18). Goodman avers that plaintiff has incurred $439,878.10 to date in construction costs and design professional expenses (NYSCEF Doc No. 157, ¶¶ 15-16). A minimum of $141,000, excluding design fees, is needed to repair the parapets and the roof substructure (*id.*, ¶¶ 17 and 24).

Plaintiff has also paid $29,124 in municipal fees and penalties and $350,000 in attorneys' fees (*id.*, ¶¶ 16 and 19).

Defendants admit they must pay "[s]ome costs" (oral argument tr at 65, line 21), including "reasonable costs" for the removal of the penthouse (*id.*, lines 17-18) and the DOB penalties related to that structure (*id.* at 66-67). Nevertheless, issues of fact remain as to the amount. Defendants contest whether the capstone work encouraged water to penetrate and cause damage to the parapets, spandrel beam, and masonry walls or if the damage was the normal result of prolonged freeze-thaw cycles as their expert has opined (NYSCEF Doc No. 288, Erik Madsen aff, ¶ 10). Similarly, triable issues of fact exist as to defendants' liability regarding the fire escape ladder and perimeter railing.

As for plaintiff's attorneys' fees, the general rule is that "attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989] [citations omitted]). A lease provision that provides for the payment of attorneys' fees should be strictly construed (*see Andrews 44 Coffee Shops Inc. v TST/TMW 405 Lexington, L.P.*, 40 AD3d 544, 545 [1st Dept 2007]). Pursuant to paragraph 28, plaintiff is entitled to collect reasonable attorneys' fees and costs from defendants if plaintiff performs an act that defendants were required to perform. Since plaintiff commenced this action following defendants' default, it is entitled to recover its reasonable attorneys' fees (*see O'Neill v 225 E. 73rd Owners Corp.*, 298 AD2d 239, 239 [1st Dept 2002], *lv denied* 100 NY2d 504 [2003]; *accord Isaacs v Jefferson Tenants Corp.*, 270 AD2d 95, 95 [1st Dept 2000]).

With respect to plaintiff's request for punitive damages, a plaintiff seeking punitive damages arising out of a breach of contract must allege that (1) defendant's conduct must be actionable as an independent tort; (2) the tortious conduct must be of an egregious nature (3) the

egregious conduct must be directed to plaintiff; and (4) the conduct must be part of a pattern directed at the public generally (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316, [1995], citing *Rocanova v Equitable Life Assur. Soc'y of U.S.*, 83 NY2d 603, 613 [1994]). The actions complained of here do not rise to the type of egregious conduct aimed towards the public that would warrant the imposition of punitive damages (*see Schwartz v Hotel Carlyle Owners Corp.*, 132 AD3d 541, 543 [1st Dept 2015] [claim for punitive damages insufficient as no allegation that defendants acted in a "morally reprehensible matter").

Consequently, plaintiff's motion for summary judgment on the first cause of action is granted on the issue of defendants' liability with the amount of damages due, including attorneys' fees, to be determined at the time of trial.

B. Second Cause of Action for Nuisance

Plaintiff argues that defendants' actions constitute a nuisance per se, or in the alternative, a common-law nuisance.

Although plaintiff did not plead an absolute nuisance claim in the complaint, defendants addressed the claim in their papers. Accordingly, the court will consider the issue. Defendants urge the court to dismiss this cause of action as time-barred. The Board passed the resolutions without a quorum, and did not afford defendants time to remedy the conditions. The allegations sound in negligence, not negligence per se, because DOB issued a partial vacate order well after this action was filed and because the vacate order was not related to defendants' capstone work. Plaintiff also cannot assert a nuisance for harm to its own property. Lastly, plaintiff cannot establish the requisite intent necessary for a common-law nuisance.

Addressing the limitations argument, the continuing wrong doctrine applies equally to a cause of action for nuisance, which is otherwise subject to a three-year limitations period under CPLR 214 (4) (*see Lichter v 349 Amsterdam Ave. Corp.*, 8 AD3d 212, 212 [1st Dept 2004], *lv*

dismissed 3 NY3d 738 [2004]; *1050 Tenants Corp.*, 289 AD2d at 146-147), because a "continuous wrong . . . 'generally give[s] rise to successive causes of action that accrue each time a wrong is committed'" (*Pilatich v Town of New Baltimore*, 100 AD3d 1248, 1249 [3d Dept 2012] [internal citation omitted]). Although the improvements were completed more than three years before plaintiff brought this action, the continued use of the penthouse and deck constitutes a continuous or recurring wrong that tolls the statute of limitations.

An absolute nuisance, or a nuisance per se, is "a nuisance based on an act which is unlawful, even if performed with due care" (*State of New York v Fermenta ASC Corp.*, 238 AD2d 400, 403 [2d Dept1997], *lv denied* 90 NY2d 810 [1997]). To that end, a plaintiff "need only establish a violation of law, and need not show that the nuisance was intentional or negligent" (*id.* at 403). However, a violation of law only excuses a party from proving that the act is negligent or intentional (*see Overocker v Madigan*, 113 AD3d 924, 926 [3d Dept 2014]). A plaintiff must still prove the other elements of a private nuisance, such as "proof of a situation created by the defendants which endangers or injures the property, health, safety, or comfort of a considerable number of persons" (*State of New York*, 238 AD2d at 403).

"A building or structure may constitute a nuisance by virtue of inherent lack of safety or through some harmful or illegal use" (81 NY Jur 2d, Nuisances § 40). Defendants argue that DOB never issued a notice of violation for the capstones. This fact, alone, though, is immaterial to whether plaintiff may maintain the claim (*see 61 W. 62 Owners Corp. v CGM EMP LLC*, 77 AD3d 330, 334 [1st Dept 2010], *affd as mod* 16 NY3d 822 [2011]). Defendants correctly state that a "violation of a municipal ordinance constitutes only evidence of negligence" whereas a "violation of a State statute that imposes a specific duty constitutes negligence per se" (*Elliott v City of New York*, 95 NY2d 730, 734 [2001] [citations omitted]). However, in addition to the Building Code, plaintiff has alleged that defendants' work violated the Multiple Dwelling Law. Nevertheless, a

nuisance per se cannot be predicated solely upon the existence of a violation (*see Overocker*, 113 AD3d at 926), and here, issues of fact exist whether the exterior masonry walls were in immediate danger of collapse such that the "comfort and safety of others in the building" was threatened (*Frank v Park Summit Realty Corp.*, 175 AD2d 33, 35 [1st Dept 1991], *mod on other grounds* 79 NY2d 789 [1991]). The two cases plaintiff cites in support are factually dissimilar as they involved personal injuries from unauthorized obstructions on a public street or sidewalk (*see Delaney v Philhern Realty Holding Corp.* 280 NY 461, 464 [1939] [finding that the defendant erected an obstruction on a sidewalk without the appropriate license, which caused the plaintiff to fall]; *Driscoll v New York City Tr. Auth.*, 53 AD2d 391, 394 [1st Dept 1976] [stating that the jury should have been given an absolute negligence charge because a defendant had engaged in repair work on the street without the requisite permits]).

A private nuisance is "a continuous invasion of rights – 'a pattern of continuity or recurrence of objectionable conduct'" (*Domen Holding Co. v Aranovich*, 1 NY3d 117, 124 [2003] [citation omitted]). The objectionable conduct "must interfere with a person's interest in the use and enjoyment of land" (*id.* at 123). Thus, the elements for a private nuisance claim are: "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act" (*Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570 [1977], *rearg denied* 42 NY2d 1102 [1977] [citations omitted]). An intentional interference arises when "the actor (a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from his conduct" [*id.* at 571 [internal quotation marks and citation omitted]).

The issue of whether a private nuisance exists is generally a question for the jury (*see Weinberg v Lombardi*, 217 AD2d 579, 579 [2d Dept 1995]), and in this instance, neither plaintiff nor defendants have met their burden on summary judgment. Plaintiff alleges that defendants'

improvements amounted to a nuisance because their conduct interfered with plaintiff's rights to use and enjoy the Building and caused substantial water damage to it. But, it has not shown that defendants intended to cause the interference (*see Roundabout Theatre Co. v Tishman Realty & Constr. Co.*, 302 AD2d 272, 273 [1st Dept 2003]), even though they ultimately benefited from the objectionable conduct. Wells' testimony that he was aware as early as November 2014 that repairs were necessary and offered to sign an alteration agreement (NYSCEF Doc No. 155 at 211) belies the claim that defendants had no time to abate the nuisance.

In any event, a private nuisance may arise from negligent conduct (*see Liberman v Cayre Synergy 73rd LLC*, 108 AD3d 426, 427 [1st Dept 2013]), where "negligence must be proven" (*Murphy v Both*, 84 AD3d 761, 763 [2d Dept 2011]). Despite defendants' assertion that Wells was qualified to complete the alterations, he did not consult with an architect or structural engineer about the work, including whether the roof substructure could support the added weight of the capstones, planters, decks, or greenhouse or penthouse extensions. Notably, the spandrel beam in the roof substructure has buckled. Lastly, despite discussing roof repairs with the Board on prior occasions, defendants did not advise the Board of their alterations. Whether defendants' actions were reasonable, and whether they breached a duty of care by performing the work in a negligent manner should be left to a jury to determine.

C. Third Cause of Action for Injunctive Relief and Fourth Cause of Action and the First, Second and Third Counterclaims for a Declaratory Judgment

The third and fourth causes of action seek an injunction prohibiting defendants from using the roof in violation of the Building's governing documents and the law, and a judgment declaring that defendants' attempt to occupy the entire roof is illegal. Defendants' first, second and third counterclaims essentially seek a declaratory judgment expanding their easement to cover the entire usable portion of the roof.

Plaintiff submits that the governing documents granted the seventh floor tenants a revocable license, not an easement, and defendants cannot claim an express or prescriptive easement over a common area. Assuming the documents created an express easement, plaintiff maintains that the easement must be limited to 700 square feet per the Offering Plan.

Defendants posit that the Offering Plan and Lease created an express easement over the entire usable portion of the roof because both documents excluded only the stairway/elevator bulkhead, chimney and flue outlets. They submit that plaintiff erroneously relies upon the Offering Plan as evidence that their use was restricted to 700 square feet because that estimate was one of several typographical errors in that document. Moreover, plaintiff's interpretation of the documents is nonsensical. The Offering Plan allocated three shares to both the Unit and the commercial unit to account for their larger sizes and higher maintenance costs, whereas all other floor-through units were allocated two shares. Even if the documents created an express easement of only 700 square feet, defendants claim to have acquired an easement by prescription over the entire usable portion of the roof.

CPLR 3001 provides, in part, that the "court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." A declaratory judgment action requires an actual controversy (*see Long Is. Light. Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253, 253 [1st Dept 2006], *appeal dismissed* 8 NY3d 956 [2007]). Relief is limited to a declaration of the parties' legal rights based on the facts presented (*see Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 100 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]).

It is well settled that "[t]he relationship between the shareholder/lessees of a cooperative corporation and the corporation is determined by the certificate of incorporation, the corporation's bylaws and the proprietary lease" (*Fe Bland v Two Trees Mgt. Co.*, 66 NY2d 556, 563 [1985]),

and that ordinary contract principles apply in interpreting those documents (*see Kralik v 239 E. 79th St. Owners Corp.*, 5 NY3d 54, 58 [2005]; *see also George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 217 [1978] [stating that "a lease is subject to the rules of construction applicable to any other agreement"]). Generally, a written agreement must be construed according to the parties' intent (*see Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). The document must be read as a whole "to determine its purpose and intent" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]), and "'particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties manifested thereby'" (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 39 [2018], quoting *Kolbe v Tibbetts*, 22 NY3d 344, 353 [2013]). Thus, "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" without consideration of extrinsic evidence (*W.W.W. Assoc.*, 77 NY2d at 162). But, if the terms are "susceptible of two reasonable interpretations," then the contract is ambiguous (*Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014] [internal quotation marks and citation omitted]). In that instance, the court may consider extrinsic evidence to determine the parties' intent (*see Greenfield*, 98 NY2d at 569).

The Offering Plan and the Lease determine the extent of defendants' rights to the roof (*see Fairmont Tenants Corp.*, 162 AD3d at 442; *1050 Fifth Ave. v May*, 247 AD2d 243, 243 [1st Dept 1998]). Paragraph 7 of the Lease grants the Unit's occupant "exclusive use of substantial portions of the roof" (*see Rose v 115 Tenants Corp.*, 150 AD3d 472, 472 [1st Dept 2017]; *Gracie Terrace Apartment Corp. v Goldstone*, 103 AD2d 699, 700 [1st Dept 1984], *appeal dismissed* 63 NY2d 952 [1984]), making a portion of the roof part of the leased premises (*see Garza v 508 W. 112th St., Inc.*, 71 AD3d 567, 567 [1st Dept 2010]). The Offering Plan contains nearly identical language. Thus, the documents plainly grant the occupants of the Unit "exclusive use" of the roof (*see Washburn v 166 East 96th Street Owners Corp.*, 166 AD2d 272, 273 [1st Dept 1990]).

"Whereas a license connotes use or occupancy of the grantor's premises, a lease grants exclusive possession of designated space to a tenant, subject to rights specifically reserved by the lessor" (*Prospect Owners Corp. v Sandmeyer*, 62 AD3d 601, 602 [1st Dept 2009], *lv denied* 13 NY3d 717 [2010] [internal quotation marks and citation omitted]). Here, defendants were granted "exclusive use" of the roof, despite the controlling documents' characterization of such use as an easement, and not a revocable license (*see City of New York v Pennsylvania R.R. Co.*, 37 NY2d 298, 300 [1975] ["A court in its effort to determine the true character of an instrument must look at the nature of the right rather than to the name that the parties gave it"]). Defendants' use, though, is modified by the language in paragraph 21 of the Lease describing an "easement with exclusive use of substantial portions of the roof, exclusive of elevator bulkhead, chimney, flue outlets, and other spaces which are reserved for maintenance" (NYSCEF Doc No. 160 at 7). The Offering Plan further describes the grant as an "easement of exclusive use of substantial portions of the roof, exclusive of elevator bulkhead, chimney, flue outlets, and other spaces which are reserved for maintenance. This exclusive easement space is estimated at about 700 square feet" (NYSCEF Doc No. 158 at 7).

The terms describing the size of defendants' area of exclusive use are ambiguous. The parties agree that the elevator bulkhead, chimney and flue outlets are excluded. However, the word "substantial" and the term "other spaces" are not defined in the Lease or the Offering Plan. The Offering Plan also restricts the size of the easement to approximately 700 square feet, without designating where the exclusive easement lies atop the roof.

Where language describing an express easement is ambiguous, the court may consider the surrounding circumstances to determine the parties' intent (*see Jhae Mook Chung v Maxam Props., LLC*, 73 AD3d 505, 506 [1st Dept 2010]; *Board of Mgrs. of Bayside Plaza Condominium v Mittman*, 50 AD3d 718, 719 [2d Dept 2008]). Defendants assert that the size of the easement in

the Offering Plan should have read 1,700 square feet, which is the size of the entire usable portion of the roof, and that the missing "1" was a mere typographical error. "A scrivener's error constitutes a mistake solely in the reduction of an agreement to writing" (*Rosalie Estates, Inc. v Colonia Ins. Co.*, 227 AD2d 335, 337 [1st Dept 1996]), and "courts may as a matter of interpretation carry out the intention of a contract by transposing, rejecting, or supplying words to make the meaning of the contract more clear . . . where some absurdity has been identified or the contract would otherwise be unenforceable either in whole or in part" (*Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 547-548 [1995] [citations omitted]). A party asserting a claim of mistake must "overcome the heavy presumption that a deliberately prepared and executed written instrument manifested the true intention of the parties, [with] evidence of a very high order" (*George Backer Mgt. Corp.*, 46 NY2d at 219, citing *Christopher & Tenth St. R.R. Co. v Twenty-third St. Ry. Co.*, 149 NY 51, 58 [1896]).

Defendants' contention that Wells, as the sponsor, had always intended to create an easement over the entire useable portion of the roof is not substantiated by persuasive "evidence of a very high order" (*Backer Mgt. Corp.*, 46 NY2d at 219). The fact that the commercial unit and the Unit were both issued three shares each to account for their larger sizes militates in favor of finding that the easement measures more than 700 square feet. However, despite Wells' inexperience as a sponsor, he retained counsel to prepare the Offering Plan and the Lease, and he consulted with an architect and others regarding the conversion (NYSCEF Doc No. 155 at 28). Wells did not testify or affirm that he directed his attorney to describe the easement as measuring 1,700 square feet, and defendants offered no proof from that attorney that the directive had been communicated to him (*see Ford Motor Credit Co. v Atlantic Mut. Ins. Co.*, 294 AD2d 206, 206 [1st Dept 2002]). Significantly, defendants' position is supported solely by Wells' statements, and defendants would be the ultimate benefactors of any finding in their favor. Finally, defendants

never objected to the error before plaintiff commenced this action (*see Matter of Union Indem. Ins. Co. of N.Y.*, 162 AD2d 398, 399 [1st Dept 1990]). Thus, a triable issue of fact exists as to whether the typographical mistake may be labeled an unintended scrivener's error.

Next, defendants rely on the doctrine of *inclusio unius est exclusio alterius*, which is "[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative" (Black's Law Dictionary [10th ed 2014], *expressio unius est exclusio alterius*), to support their position that all areas other than the stairway/elevator bulkhead, chimney and flue outlets are included in the easement (*see Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 404 [1984]). Their reliance on this doctrine, though, is misplaced. The controlling documents plainly granted plaintiff the right to reserve other areas for maintenance (*see Baker v 16 Sutton Place Apt. Corp.*, 72 AD3d 500, 500-501 [1st Dept 2010] [denying summary judgment to the plaintiff tenants/shareholders who had argued that the defendant cooperative's proprietary lease restricted the cooperative's common roof rights to erecting and maintaining equipment]). Additionally, an issue of fact exists whether defendants' area of exclusive use is restricted to 700 square feet, as noted above.

Defendants also contend that the water tank bulkhead constitutes an appurtenance to their Unit. Appurtenances are "incorporeal easements or rights and privileges which are essential or reasonably necessary to the full beneficial use and enjoyment of the property conveyed or leased" (*Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 267 [1st Dept 2009] [internal citation omitted]). Generally, appurtenant rights arise from the parties' intent at the time a lease is executed (*id.* at 268-269). "[A]n appurtenant easement need not be 'absolutely necessary to the enjoyment of the property' but only necessary to its full enjoyment" (*M. N. S. Brandell, Inc. v Roosevelt Nassau Operating Corp.*, 42 AD2d 708, 712 [2d Dept 1973], *mot to dismiss appeal denied* 33 NY2d 682 [1973] [internal quotation marks and citation omitted]). When the Offering

Plan was issued, the water tank supplied domestic water to the Building (NYSCEF Doc No. 2 at 66 and 71), and the Building was not converted to a pump system until 1982 at the earliest (NYSCEF Doc No. 156, Tumulty affirmation, Exhibit "E" at 2). Thus, when Wells filed the Offering Plan in 1980 and executed the Lease in 1981, he could not have intended to include the water tank bulkhead as an appurtenance. While the water tank bulkhead provided defendants with a more convenient access point to the roof, "mere convenience is not sufficient" to find an appurtenant easement (*id.*, quoting *Anixter v Bangor Realty Corp.*, 104 Misc 613, 616 [Sup Ct, NY County 1918]). Thus, defendants have not established that the water tank bulkhead qualifies as an appurtenance.

Defendants next argue that they acquired a prescriptive easement over the entire usable portion of the roof. "An easement by prescription is generally demonstrated by proof of the adverse, open and notorious, continuous, and uninterrupted use of the subject property for the prescriptive period" (*Gilliland v Acquafredda Enters., LLC*, 92 AD3d 19, 27 [1st Dept 2011], quoting *Almeida v Wells*, 74 AD3d 1256, 1259 [2d Dept 2010]). "[T]he period of prescription begins to run when a party acting under a claim of right commences a use of the easement that is adverse to its owner" (*Spiegel v Ferraro*, 73 NY2d 622, 627 [1989]). The party asserting the claim bears the burden of proving each element by clear and convincing evidence (*see Amalgamated Dwellings, Inc. v Hillman Hous. Corp.*, 33 AD3d 364, 364 [1st Dept 2006]). If such use is shown to be open, notorious, continuous and undisputed, then it is incumbent upon the opposing party to show that such use was permissive (*id.*).

Defendants tender affirmations or affidavits from former tenants and shareholders Honda, Robert Sloan ("Sloan") and Michael Witkin ("Witkin") collectively describing a belief that Wells owned the entire roof and controlled all access to it via a locked door from the common stairway (NYSCEF Doc No. 201, Honda affirmation, ¶¶ 3-4; NYSCEF Doc No. 199, Sloan affidavit, ¶¶ 6-

8; NYSCEF Doc No. 200, Witkin aff, ¶¶ 6-7). Defendants' documents purport to show that Wells maintained sole possession of the key to the locked door (NYSCEF Doc No. 191, Wells affirmation, Exhibit "K" at 7, 9). However, triable issues of fact exist concerning the exclusivity and permissive nature of defendants' use (*see Prospect Owners Corp.*, 62 AD3d at 603 [stating that the defendants had not acquired exclusive use of the roof through adverse possession because of the parties' ongoing landlord/tenant relationship]; *Cassidy v Reydon Shores Prop. Owners Assn.*, 233 AD2d 359, 360 [2d Dept 1996] [finding a question of fact as to the effectiveness of the attempts to exclude others from the easement]). Goodman testified that he gave plaintiff copies of the key to the roof (NYSCEF Doc No. 265, plaintiff's affirmation in opposition, Exhibit "A" [Goodman tr] at 55), and Kidd testified that he never needed permission to access the roof (NYSCEF Doc No. 266, plaintiff's affirmation in opposition, Exhibit "B" [Kidd tr] at 51 and 102). Wells also affirmed that everyone in the Building had access to the roof for maintenance (NYSCEF Doc No. 180, ¶ 13). Lastly, defendants have not demonstrated that their improvements covered the entire usable portion of the roof.

"A declaratory judgment should not be granted where the action serves to increase rather than to decrease litigation or where it results in trying a controversy piecemeal" (*Smith v Western Union Tel. Co.*, 276 App. Div. 210, 213-214 [1st Dept 1949], *affd* 302 NY 683 [1951]). Given the issues related to the size of defendants' easement of exclusive use, the court declines to issue injunctive relief or a judgment declaring the parties' rights to the roof. As such, the motions for summary judgment on plaintiff's third and fourth causes of action and on defendants' first, second and third counterclaims are denied.

D. The Fourth Counterclaim for Breach of Contract and the Fifth Counterclaim for Breach of Covenant of Quiet Enjoyment

In their fourth counterclaim, defendants allege that plaintiff breached the Lease by unreasonably withholding its consent to allow defendants to remedy the unsafe conditions on the

roof. The fifth counterclaim seeks damages for breach of the covenant of quiet enjoyment. Defendants claim that the Board has denied them their ability to quietly use and enjoy the roof. Additionally, defendants allege that the Board has neither remedied a persistent gas leak at the Building nor has it stopped another shareholder from engaging in illegal commercial activity in her unit. Neither plaintiff nor defendants addressed the specific merits of these two causes of action. Thus, the motions for summary judgment on defendants' fourth and fifth counterclaims are denied.

The court has considered the other arguments raised by the parties and finds them unavailing.

CONCLUSION

Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing the complaint and for summary judgment on their counterclaims (motion sequence no. 005) is denied, and it is further

ORDERED that plaintiff's motion for summary judgment (motion sequence no. 006) is granted on the issue of defendants' liability on the first cause of action, and the motion is otherwise denied; and it is further

ORDERED that the amount of damages due to plaintiff on the first cause of action, including plaintiff's reasonable attorneys' fees and costs, shall be assessed at the time of trial.

Dated: May 31, 2019

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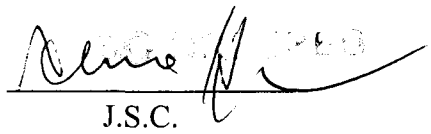

J.S.C.