142 Fifth Ave. Owners Corp. v Ferrante
2019 NY Slip Op 33092(U)
October 17, 2019
Supreme Court, New York County
Docket Number: 153090/2014
Judge: Margaret A. Chan

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN **PART** IAS MOTION 33EFM

Justice

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142 FIFTH AVENUE OWNERS CORP.

Plaintiff,

- v -

FERRANTE, FRANK; FERRANTE IMMOBILIARE LLC; FERRANTE LLC

Defendant.

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INDEX NO. 153090/2014

MOTION DATE 06/05/2019

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 165, 166, 167

were read on this motion to/for JUDGMENT - SUMMARY.

In this property dispute involving a cooperative corporation, plaintiff 142 Fifth Avenue Owners Corp. ("142 FAOC") moves in motion sequence 005 for: (1) summary judgment pursuant to CPLR 3212(a) on its first cause of action for a permanent injunction against defendants Frank Ferrante, Ferrante Immobiliare, LLC, and Ferrante LLC (collectively, "defendants"), and on its second cause of action for judgment on legal fees; (2) summary judgment pursuant to CPLR 3212(a), on defendants' fifth counterclaim; and (3) dismissal of all of defendants' affirmative defenses and counterclaims pursuant to CPLR 3211(b) (NYSCEF #128 – Notice of Motion). Defendants oppose the motion. The Decision and Order is as follows:

FACTS

Background

Plaintiff is a cooperative corporation and the owner and lessor of the building located at 142 Fifth Avenue (the "building"), also known as 5 West 19th Street, in the City, County, and State of New York. The building is a ten-story, L-shaped building containing distinct commercial and residential wings. The commercial and residential wings of the building were separated pursuant to a 1982 amendment to the Plan of Cooperative Organization ("Offering Plan") (NYSCEF #135 – Offering Plan). The commercial units face West 19th Street while the residential units face Fifth Avenue. In between the residential and commercial sides of the building on each floor is a vestibule area that allows access to a freight elevator and a fire door, separating the commercial section from the residential side of the building.

In February 2003, Ferrante Immobiliare purchased 100 shares of stock in 142 FAOC, split equally between two units, 10B and 10C, which comprise the commercial side of the tenth-floor. Unit 10A, the sole residential unit on the tenth-floor and owned by Michael Beys, is allocated 70 shares. All other floors in the building above street level are allocated a collective 165 total shares per floor.

The chief dispute in this matter concerns ownership of the building's roof and a tenth-floor elevator vestibule. Plaintiff claims that both are common space owned by the building; defendants claim that both spaces are controlled by defendants. The pertinent documents are described below.

The 142 FAOC Offering Plan describes the tenth-floor units as "10 and Roof" with a collective square footage of "7200 plus roof (such use may not impinge upon the load factor of any other floor)" (NYSCEF #135 at 6).

Defendants' lease agreements with plaintiff for Units 10B and 10C (collectively "Unit") defines the demised premises as follows:

> "Demised Premises: ... As used herein 'Unit' means the rooms in the building as partitioned on the date of the execution of this Lease designated by the above-stated Unit 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 #134 – Proprietary Lease at 5 and 46).

However, paragraph 7 of the lease agreements also contain the following provision:

> Penthouses, Terraces, and Balconies. 7. If the Unit includes a terrace, balcony, or a portion of the roof adjoining a penthouse, the Lease shall have and enjoy the exclusive use of the terrace or balcony or the 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 areas and antennas, for its use and the use of the lessees in the building and shall have the right of access thereto for such installations and for the repair thereof. [.....] 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. (*id.* at 7).

Additionally, paragraph 21(a) of the lease states that lessee maintains the right to alter, create a penthouse or otherwise develop any portion of the roof, so long as the lessee obtains the written consent of the Co-op (*id.* at 17).

Defendants claim that when they purchased shares in the building, they were marketed the entire footprint of the commercial part of the tenth-floor from exterior wall to exterior wall, consistent with the Offering Plan and the Leases, subject to limited exceptions. Defendants submit the affidavit of former Co-op Board member and former president Alessandro Repola, who had assured defendants that they had exclusive use of the roof above the premises (NYSCEF #149 – Repola Affidavit, ¶6).

Inciting Incident

This litigation arose when defendants alarmed and padlocked a freight elevator vestibule and roof access hatch, preventing plaintiff from accessing the roof. Plaintiff filed suit, seeking a permanent injunction to prevent defendants from interfering with its access to the roof. Defendants responded with counterclaims, claiming that pursuant to the cooperative Offering Plan and the leases that defendants control the roof. Defendants make numerous claims regarding plaintiff's bad behavior, including constantly disrupting defendants' business by doing work on the roof and that the Board and other tenants have conspired in an attempt to install central air conditioning on the roof, diminishing defendants' roof rights.

A preliminary injunction issued on May 7, 2014, restrained defendants from preventing plaintiff or its agents access to the roof (NYSCEF #50 –Decision and Order of Hon. Peter H. Moulton dated May 7, 2014).

DISCUSSION

Summary Judgment Standard

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*, 18 NY3d 499 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp*, 298 AD2d 224, 226 [1st Dept 2002]). "A motion for summary judgment, irrespective of by whom it was made, empowers a court to search the record and

award judgment where appropriate" (*GHR Energy Corp. v Stinnes Interoil Inc.*, 165 AD2d 707, 708 [1st Dept 1990]).

Declaratory Judgment on Defendants' Fifth Counterclaim

Defendants' fifth counterclaim seeks a declaratory judgment determining the following: (i) that the freight elevator vestibule, as well as the roof area immediately above such area, is part of the Unit and that plaintiff's access thereto must be upon reasonable notice to the defendants, except in instances of emergency access; (ii) defendants are required to receive prior notice from the plaintiff as to all access to the Unit and the roof above the Unit, except with respect to instances of emergency access; (iii) reasonable advance notice for access shall be determined by the parties depending upon the circumstances; and (iv) the meaning of "appurtenant" for the purpose of determining the area encompassed by the defendants' rights to exclusive use of the roof above the Unit (NYSCEF #132 – Answer with Counterclaims at ¶¶ 99-100).

Moving for summary judgment, plaintiff argues that declaratory judgment should be issued in its favor on all four charges. Plaintiff argues that pursuant to the terms of the leases and case law, defendants have no right to exercise control over the freight elevator vestibule or the roof above defendants' unit. Plaintiff further argues that defendants' roof rights are inchoate and dependent on the development of a penthouse or other means to adjoin the roof to defendants' unit, subject to the building's rules and rights to use and maintain the roof above defendants' unit. Plaintiff further argues there is thus no need to provide defendants notice regarding access to the elevator vestibule or the common areas of the roof. This decision and order will address prongs one, four, two and three in that order.

Freight Elevator Vestibule Rights

Plaintiff claims that the tenth-floor freight elevator vestibule, and the roof above this space, are common areas of the building. Plaintiff argues that there is nothing in the leases or the Offering Plan to support defendants' claim that the freight vestibule is part of the Unit.

There is a freight elevator vestibule on each floor of the building where the elevator opens so that employees or contractors of the building may unload or load items. It is also where trash is stored on each floor, to be collected and brought out of the building. The freight vestibule on the tenth-floor is approximately five (5) feet by six (6) feet-seven and half (7.5) inches. The vestibule occupies the space between the commercial defendants' unit and the tenth-floor residential unit. Plaintiff points

to the floor plans attached to the Offering Plan to establish that the freight elevator vestibule is not a part of defendants' unit (NYSCEF #3 – Floor Plan)[1].

Notably, plaintiff installed a ladder and hatch above the tenth-floor vestibule to permit access to the roof without disturbing the tenth-floor occupants. Prior to the installation of the roof hatch, employees and contractors would take the freight elevator to the tenth-floor and then walk through the residential or commercial units to access one of the fire stairs at either end of the building to walk up to the roof. The hatch was installed to avoid this issue. Plaintiff claims that the hatch installation further indicates that the vestibule space, and the roof space above it, are common areas of the building.

Defendants in response offer the affidavit of Alessandro Repola, the former Co-op Board president, who averred that the Co-op Board made a proposal to defendants to install the hatch access to the roof. Repola averred that the whole Board "understood that the vestibule space was part of the tenth-floor commercial space, much as the vestibule space outside the decommissioned residential-side freight elevators had become part of each respective residential unit" (NYSCEF #149 at ¶4). Repola continued that "142 FAOC exercised no control over the vestibule space on the tenth floor, or on any other floor in the building... . Based on these understandings, the Board of Directors and I did not believe that we were taking or otherwise appropriating any rights that Defendants had to the vestibule space or the roof by proposing the installation of the hatch and accompanying ladder" (*id.*).

This branch of plaintiff's motion for summary judgment is denied. There remains a question of fact regarding the ownership of the tenth-floor elevator vestibule. Plaintiff has not conclusively shown that the vestibule is common space. The court first looks at the contractual language governing the parties' relationship and the documentary evidence regarding the building's floor plan. Neither the Offering Plan nor the unit leases clearly define what space constitutes the commercial space versus the common areas. Furthermore, plaintiff's submitted floor plan does not indicate that the vestibule is common space – it merely shows the location of the vestibule. There are no markers on the floor plan that demarcate the units or show what is specifically the commercial space versus the common areas of the building. The documentary evidence is thus inconclusive regarding the nature of the elevator vestibule space. As there is a latent ambiguity in the contracts, the court turns to the testimonial evidence (*see Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 [2013] ["Parol evidence – evidence outside the four corners of the document – is admissible only if a court finds an ambiguity in the contract."]).

[1] On the motion, plaintiff attached the same Floor Plan exhibit as NYSCEF #139, but that version is of lower resolution. The court will utilize the earlier and clearer scan for determining this motion.

However, the testimonial evidence submitted does not offer further clarity and there remains a question of fact regarding the ownership of the space. Plaintiff's affiant Ernest Barbieri, the current Co-op Board President, disputes Repola's averment that the vestibule space is defendants' explaining the building's necessary use of the freight elevator, vestibule area (NYSCEF #130 – Barbieri Affidavit at ¶¶ 10, 12). The conflicting affidavits presented by both parties only creates a question of fact. As such, plaintiff cannot make a prima facie showing of entitlement to judgment and even if it could, defendants have rebutted plaintiff's showing. It is unclear whether plaintiff exercises control over the freight elevator vestibule.

Roof Rights

The fourth prong of defendants' fifth counterclaim is for a determination of the meaning of "appurtenant" for the purpose of defining the area encompassed by the defendants' rights to exclusive use of the roof above defendants' unit.

Plaintiff argues that neither the unit Leases nor the Offering Plan explicitly define the square footage or portion of the roof the defendants have the right to develop. Plaintiff claims that the Leases only contain a general reference to a lessee's potential right to use a roof or terrace. Plaintiff further argues that as defendants' unit is currently configured, no portion of the roof is adjoined to the unit as there is no roof access through the unit itself. Plaintiff also argues that only the Offering Plan specifically refers to roof rights allocated to the defendants with the reference of "Units 10 and Roof" but argues that this right is inchoate as there is no indication of specific roof square footage allocated. Further, plaintiff contends that defendants maintain a development right (that has not been executed) over the roof subject to approval and limitations as set by the Board

Plaintiff also argues that, based on the Leases and the Offering Plan, the roof is not appurtenant to or part of defendants' unit. Plaintiff claims that defendants' failure to develop the roof in a manner that allows for access means that the roof is not a part of defendants' unit. Plaintiff cites to the somewhat factually similar *Rushmore v Park Regis Apt. Corp.*, 2018 NY Slip Op 31335(U) [Sup Ct, New York County 2018] for the proposition that the phrases "adjoining a penthouse" or "appurtenant to the penthouse" only refers to the portion of the roof or building that is on the same level as the penthouse. The *Rushmore* decision held that:

> "[a]n 'appurtenance' is a right of way that is necessary to give usable enjoyment to the conveyed premises. Here, the exclusive use of the penthouse roof by the owner of the penthouse unit is not necessary to give that owner usable enjoyment of the unit, just as the use of the roof of the building is not necessary to give the owner of the apartment units immediately thereunder usable enjoyment of those apartments.

> Contrary to the plaintiffs' contention, the phrase 'portion of the roof adjoining a penthouse' and 'portion of the roof appurtenant to the penthouse' in the proprietary lease were not intended by the parties to refer to different areas of the roof but only the roof area on the same level and just outside the penthouse" (*Rushmore*, 2018 NY Slip Op 31335(U) at *3).

Plaintiff further argues that defendants have not triggered their roof rights because they do not maintain any portion of the roof. According to paragraph 7 of the Lease, the lessee "shall keep... [the] 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" (NYSCEF #102 at ¶7).

Defendants respond that the case law to which plaintiff cites is inapposite here as this case is factually dissimilar. Defendants point out that *Rushmore*, and its antecedent cases *Rose v 115 Tenants Corp* (150 AD3d 472 [1st Dept 2017]) and *Grace Terrace Apt. Corp. v Goldstone* (103 AD2d 699 [1st Dept 1984]) did not have the same issue regarding an Offering Plan that specifically allocates the roof to the tenants. Defendants point the court to *Likokoas v 200 East 36th Street Corp.* (48 AD3d 245, 245-246 [1st Dept 2008]) for the proposition that cooperative offering plans and proprietary leases constitute controlling documents. As such, defendants contend, the Offering Plan at issue here clearly states that the tenth-floor units also includes the "roof" and is controlling.

Defendants point to the testimony of Co-op Board member Ernest Barbieri, who stated that "only the people from the tenth floor have roof rights so they are the only ones who should be – in terms of shareholders or tenants on the roof" (NYSCEF #152 – Barbieri Deposition at 51). Additionally, defendants point to the testimony of Co-op Board member James Bondi, who testified that defendants pay extra maintenance fees "with respect to his rights, with respect to the roof" (NSYCEF #153 – Bondi Deposition at 18). Bondi testified that defendants had the "right to utilize certain portions of the roof" (*id.*). Michael Beys, the tenth-floor residential tenant, testified that defendants had ongoing and existing rights to use the roof above defendants' premises (NYSCEF #151 – Beys Deposition at 29).

Defendants also takes issue with plaintiff's argument that defendants' claim for roof access fails because no rights accrue unless and until defendants actually develop the space above the premises. Defendants' state that their right to use and develop the roof is agreed to by plaintiff, therefore it does not make sense to deprive defendants of their right to use the roof simply because defendants have not utilized it yet.

This branch of plaintiff's motion is denied as it remains a question of fact whether defendants' ownership rights extend to the exclusive use of the roof. There

is a conflict between the Offering Plan and the Leases, and within the Leases themselves, regarding the boundaries of the unit, which cannot be properly resolved on summary judgment. The unit Leases and the Offering Plan constitute controlling documents (*see Likokoas*, 48 AD3d at 246; *L J Kings, LLC v Woodstock Owners Corp.*, 46 AD3d 321, 322 [1st Dept 2007] [controlling documents of cooperative include offering plan and proprietary lease]; *see also Berenger v 261 West LLC*, 93 AD3d 175, 185 [1st Dept 2012] [in a fraud case, offering plan was used to resolve issue regarding control over a cooling tower on a roof]). Based on these controlling documents, it is unclear whether defendants do or do not have control over the roof. At the very least, the parties agree that defendants maintain a limited development right over the roof. However, the question of defendants' exclusive use of the roof remains open due to the ambiguities in the controlling documents. The testimony cited by defendants indicates that many of the Co-op Board members acknowledge that defendants have some type of rights over the roof. However, it is still unclear what, exactly, is the extent of defendants' roof rights. As such, this branch of plaintiff's motion is denied.

Defendants' Entitlement to Notice from Plaintiff Regarding Entry

Defendants' second and third prongs of their fifth counterclaim regard their right to receive notice from plaintiff in the event that plaintiff requires access to the roof. Plaintiff claims that no notice is required to access the roof or the freight elevator vestibule. This branch of plaintiff's motion is denied.

The Leases state that defendants are entitled "at all times during the term [of the Leases to] quietly have, hold and enjoy the Unit without any let, suit, trouble or hindrance from the [plaintiff]" and that plaintiff, its agents and workmen have the right to enter the defendants' premises to "visit, examine, or enter the Unit... at any reasonable hour of the day upon notice, or at any time and without notice in case of emergency, to make or facilitate repairs in any part of the building or to cure a default by Defendants" (NYSCEF #134 at ¶¶10, 25).

As there is no resolution regarding the state of control over the roof or the freight elevator vestibule, there cannot be a determination regarding notice at this time. Defendants are entitled to reasonable notice regarding entry of their unit. If the vestibule and the roof constitute part of defendants' unit, they will be entitled to reasonable notice. If the vestibule and roof are not part of defendants' unit, they will not be entitled to such notice. As such, plaintiff's motion regarding notice must be denied.

Plaintiff's Permanent Injunction and Attorneys' Fees Claims

The portion of plaintiff's motion for summary judgment on its causes of action for a permanent injunction and attorneys' fees is denied. Plaintiff's first cause of

action is for a permanent injunction enjoining defendants from exercising dominion and control over the freight elevator vestibule, the ladder and hatch for roof access located above the vestibule, and any area of the roof of the building not appurtenant to defendants' unit and enjoining defendants from interfering with or harassing any building employee or vendor or external service provider engaged by plaintiff from engaging in or performing services in the vestibule or the roof (NYSCEF #131 – Complaint at 10). As discussed above, there remain questions of fact regarding ownership over the elevator vestibule and the roof. As such, issuing a permanent injunction is premature at this time. Likewise, plaintiff's second cause of action for attorneys' fees is not amenable to resolution at this time.

The court notes that the preliminary injunction issued on May 7, 2014, remains active (NYSCEF #50 – Decision and Order dated May 7, 2014). Defendants remain enjoined from interfering with plaintiff's access to the freight elevator vestibule and the roof access ladder and hatch at this time (*id.*).

Plaintiff's Motion to Dismiss Defendants' Affirmative Defenses and Counterclaims

The next portions of plaintiff's motion regard defendants' affirmative defenses and first through fourth counterclaims. Defendants' affirmative defenses are as follows: (1) plaintiff's complaint fails to state a cause of action; (2) plaintiff's relief is barred due to unclean hands; (3) plaintiff's relief is barred by waiver and estoppel; (4) plaintiff failed to mitigate damages and/or reduced its alleged losses; (5) plaintiff's relief is barred by laches; and (6) plaintiff breached fiduciary duty to defendants (NYSCEF #51 – Answer with Counterclaims).

Defendants' counterclaims are as follows: (1) breach of covenant of quiet enjoyment; (2) breach of fiduciary duty; (3) breach of contract; and (4) tortious interference with performance of defendants' business (*id.*).

Plaintiff's notice of motion states that it moves under CPLR 3211(b) to dismiss both the affirmative defenses and counterclaims (NSYCEF #128 – Notice of Motion). Plaintiff's memorandum of law states that it seeks summary judgment dismissal of defendants' first through fourth counterclaims.

As a preliminary argument, defendants claim that plaintiff's motion is defective as the notice of motion and memorandum of law are in conflict and it is unclear whether the counterclaims should be analyzed under CPLR 3211 or CPLR 3212. Defendants claim that plaintiff fails to articulate the basis upon which it seeks dismissal and that this is fatal to the motion.

Defendants argument is rejected. It is sufficiently clear from plaintiff's moving papers that it seeks summary judgment on defendants' counterclaims. "The court has the power to ignore the mistake where granting the relief would not be a

drastic remedy and where the plaintiff would not be prejudiced thereby" (*Ingle v Glamore Motor Sales, Inc.*, 140 AD2d 493 [2d Dept 1988], *affd.* 73 NY2d 183 [1989]). Defendants are not prejudiced by addressing the counterclaims pursuant to CPLR 3212. Defendants were clearly aware and on notice that plaintiff's motion was one for summary judgment. As such, the court will analyze plaintiff's motion under CPLR 3211(b) for the affirmative defenses and pursuant to CPLR 3212 for summary judgment on defendants' counterclaims.

Defendants also attempt to amend their answer in their opposition to this motion pursuant to CPLR 3211(e) (NYSCEF #164 – Proposed Amended Answer). CPLR 3211(e) does not provide the relief sought by defendants. Defendants should have, but did not, cross-move pursuant to CPLR 3025 for this relief. Even if defendants had properly moved to amend their answer, they provide no reason for the delay in seeking to amend their answer. This matter was marked ready for trial on April 5, 2019, by plaintiff's filing of its note of issue (NYSCEF #127 – Note of Issue). Defendants waited until the instant motion to seek relief. Furthermore, defendants' amended answer does not remedy the infirmities of their original answer. As such, defendants' request to amend their answer is denied.

Breach of Covenant of Quiet Enjoyment Counterclaim (Counterclaim One)

"To make out a prima facie case of breach of the covenant of quiet enjoyment, a tenant must establish that the landlord's conduct substantially and materially deprived the tenant of the beneficial use and enjoyment of the premises. There must be an actual ouster, either total or partial, or if the eviction is constructive, there must have been an abandonment of the premises by the tenant" (*Jackson v Westminster House Owners Inc.*, 24 AD3d 249, 250 [1st Dept 2005] [citations omitted]).

Defendants claim that: (1) between 2003 and 2009, the Co-op's Building personnel, contractors, and servicers would traverse through his unit to access the stairway that provided access to the roof, which caused noise, disruption, and property damage in the Unit; (2) the Co-op performed repairs and maintenance of the Buildings' systems located on the roof without providing him with prior notice; and (3) the Co-op routinely accessed the roof via the vestibule hatch without his consent, which he claims is required (NYSCEF #51 at ¶¶47-56). Defendants also claim "mental anguish" from the alleged actions of plaintiff. This claim is little changed in the amended answer (NYSCEF #164).

Defendants' first counterclaim is dismissed. Defendants have failed to show that it was actually ousted or that it was constructively evicted from the roof. As discussed at length in this decision it remains an open question as to whether defendants or plaintiff owns the roof. Assuming arguendo that defendants own the roof, there is no indication that defendants were ousted or constructively evicted

from the roof. Defendants do not allege or show any action taken by plaintiff that disrupted defendants' possession of the roof. Defendants make a claim that plaintiff wishes to install air conditioning units on the roof, however, this has not occurred yet, so this harm is purely speculative.

As to the mental anguish claim, "there is no right of recovery for mental distress resulting from the breach of contract-related duty" (*Wehringer v Standard Sec. Life Ins. Co. of New York*, 57 NY2d 757, 759 [1982]). As such, defendants cannot make out a cause of action based on the breach of the covenant of quiet enjoyment, and the counterclaim is dismissed.

Breach of Fiduciary Duty Counterclaim (Counterclaim Two)

Defendants' second counterclaim for breach of fiduciary duty is dismissed. The elements for breach of fiduciary duty are: "(1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages caused by the defendant's misconduct" (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 807 [2d Dept 2011]). Generally, a cooperative "corporation does not owe fiduciary duties to its members or shareholders" (*Peacock v Herald Square Loft Corp.*, 67 AD3d 442, 443 [1st Dept 2009] [citing *Hyman v New York Stock Exch., Inc.*, 46 AD3d 335, 337 [2007]). However, as defendants point out, there may be cognizable claims for breach of fiduciary duty owed by a sponsor-appointed first board of managers of a condominium development (*see Board of Mgrs of Whispering Pines v Whispering Pines Assocs.*, 204 AD2d 376 [2d Dept 1994]).

Here, plaintiff is a cooperative corporation, not a "sponsor-appointed" condominium development corporation. As such, the exception does not apply and the general *Peacock* rule hold – plaintiff does not owe a fiduciary duty to defendants. In any event, defendants do not identify any misconduct by plaintiff that constitutes a breach of any fiduciary duty. Accordingly, defendants' second counterclaim is dismissed.

Breach of Contract Counterclaim (Counterclaim Three)

Plaintiff argues that defendants' third counterclaim for breach of contract should be dismissed on summary judgment. Plaintiff explicitly asks the court to look to the same arguments it used in support of its motion for summary judgment on the fifth counterclaim regarding defendants' declaratory action, as addressed at length above. However, the court rejects those arguments at this time. Defendants do not offer any substantive opposition to plaintiff's motion regarding the third counterclaim.

The elements of a breach of contract claim are: (1) formation of a contract between the parties; (2) performance by one party; (3) failure to perform by the

other party; and (4) resulting damage (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

This branch of plaintiff's motion is denied. As discussed above, there remain questions of fact regarding ownership of the roof and elevator vestibule. In the event that defendants show entitlement to the roof and elevator vestibule, plaintiff's prior actions might very well constitute breach of contract. As such, the breach of contract claim survives summary judgment.

Tortious Interference Counterclaim (Counterclaim Four)

Defendants' fourth counterclaim is for tortious interference with business/contractual relationship. The elements for tortious interference are: (1) the existence of a valid contract between the plaintiff and third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procurement of the third party's breach of the contract without justification; and (4) an actual breach of the contract and the damages resulting therefrom" (*Artwear, Inc. v. Hughes*, 202 A.D.2d 76, 85 [1st Dept 1994]).

This portion of plaintiff's motion is granted. Defendants have failed to adduce any evidence that demonstrates that they lost a subtenant due to the plaintiff's conduct. Defendants have also failed to identify any alleged contracts that the plaintiff caused defendants to lose. Defendant Ferrante's deposition testimony confirmed that all subtenant contracts were verbal month-to-month agreements, but he failed to identify which, if any, were lost due to plaintiff's actions (NYSCEF #138 – Ferrante EBT at 22-24).

In any event, defendants fail to oppose this portion of plaintiff's motion. As such, defendants' fourth counterclaim for tortious interference is dismissed.

Plaintiff's Motion to Dismiss Affirmative Defenses

CPLR 3211(b) governs a motion to dismiss affirmative defenses. On such a motion, "plaintiff bears the heavy burden of showing that the defense is without merit as a matter of law. The allegations set forth in the answer must be viewed in the light most favorable to the defendant, and 'the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed'. Further, the court should not dismiss a defense where there remain questions of fact requiring a trial" (*Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD3d 479, 481 [1st Dept 2015] [citations omitted]).

Defendants' First Affirmative Defense – Plaintiff's Failure to State a Claim

The portion of plaintiff's motion to dismiss defendants' first affirmative defense – failure to state a claim – is granted. Plaintiff's complaint alleges that it is entitled to a permanent injunction barring defendants from exercising dominion and control over common areas of the building and roof above the unit and for ejectment from any areas of the building that defendants are improperly using or controlling outside of the unit.

Plaintiff is correct that it is had adequately pled a cause of action. There remains a question of fact regarding ownership of the elevator vestibule and the roof. Plaintiff may be entitled to its permanent injunction. Plaintiff has already obtained a preliminary injunction regarding roof access (NYSCEF #50). As such, plaintiff has made out a facially valid claim for a permanent injunction. Defendant's first affirmative defense is dismissed.

Defendants' Second Affirmative Defense – Unclean Hands

The portion of plaintiff's motion to dismiss regarding defendants' second affirmative defense of unclean hands is granted. Defendants' answer provides scant details of the allegation. And defendants' proposed amended answer adds only allegations of pipe bursts and loud clanging noises that made operating within the building difficult (NYSCEF #164 at ¶¶24-28).

The affirmative defense of unclean hands is only available to defendant "where plaintiff is guilty of immoral or unconscionable conduct directly related to the subject matter and the party seeking to invoke the doctrine is injured by such conduct. In other words, relief to the plaintiff cannot be denied unless the immoral or unconscionable act alleged by the defendant was done to the defendant himself. 'If a plaintiff is not guilty of inequitable conduct toward the defendant in the transaction, his hands are as clean as the law requires'" (*Frymer v Bell*, 99 AD2d 91, 96 [1st Dept 1984] [internal citations omitted]). As such, defendants have failed to allege any unconscionable or immoral conduct that would preclude plaintiff from obtaining a permanent injunction if its ownership over the roof and elevator vestibule is established.

Defendants' Third Affirmative Defense – Waiver and Estoppel

The portion of plaintiff's motion to dismiss regarding defendants' third affirmative defense is granted. Defendants' third affirmative defense is that plaintiff has waived its rights to enforce the terms of the leases or that it is estopped from doing so.

Paragraph 26 of the Leases contains a "No Waiver" provision that states that plaintiff's failure to strictly enforce any provision of the leases do not waive its right to do so in the future. The provision reads as follows:

> "The failure of the Lessor to insist, in any one or more instances, upon a strict performance of any of the provisions of this lease, or to exercise any right or option herein contained, or to serve any notice, or to institute any action or proceeding, shall not be construed as a waiver, or a relinquishment for the future, of any such provisions, options or rights, but such provision, option or right shall continue and remain in full force and effect. No waiver provisions in proprietary leases are strictly enforced." (NYSCEF #134 at ¶26).

The "No Waiver" provision explicitly states that plaintiff's failure to exercise its rights does not constitute a waiver (*see Horowitz v 1025 Fifth Ave., Inc.*, 7 AD3d 461 [1st Dept 2004] [cooperative could require the shareholder-tenant remove an awning based upon the implementation of a House Rule and the no-waiver provision of the proprietary lease]). The documentary evidence conclusively rebuts defendants' waiver affirmative defense.

Defendants' claim for estoppel similarly has no basis. The party invoking a defense of equitable estoppel must establish "(1) [c]onduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than and inconsistent with, those which the party subsequently seeks to assert; (2) intention, or at least expectation, that such conduct will be acted upon by the other party; (3) and, in some situations, knowledge, actual or constructive, of the real facts" (*757 3rd Ave. Assoc., LLC v Patel*, 117 AD3d 451, 453 [1st Dept 2014]). Defendants simply do not provide any reason for how this defense should apply in this matter.

Defendants' Fourth Affirmative Defense – Failure to Mitigate

The portion of plaintiff's motion to dismiss regarding defendants' fourth affirmative defense is granted. Defendants' fourth affirmative defense alleges that plaintiff failed to mitigate damages. However, plaintiff is not seeking damages other than attorneys' fees incurred in this action. Defendants do not oppose this portion of plaintiff's motion. As such, the defense is irrelevant and is dismissed.

Defendants' Fifth Affirmative Defense – Laches

The portion of plaintiff's motion to dismiss regarding defendants' fifth affirmative defense is granted. Defendants' fifth affirmative defense alleges that plaintiff's action is barred by the doctrine of laches, claiming that plaintiff was unreasonably tardy in pursuing this action. However, plaintiff initiated this action within a few months of the inciting event – defendants' installation of locks on the roof hatch preventing access to the roof. "This does not constitute unreasonable or inexcusable delay by plaintiff resulting in prejudice to defendant" (*Macon v Arnlie*

Realty Co., 207 AD2d 268, 271 [1st Dept 1994]). As such, defendants' fifth affirmative defense is dismissed.

Defendants' Sixth Affirmative Defense – Breach of Fiduciary Duty

As discussed above in the section addressing defendants' counterclaim for breach of fiduciary duty, plaintiff owe no fiduciary duty to defendants. As such, defendants' sixth affirmative defense must be dismissed.

CONCLUSION

The portion of plaintiff's motion for summary judgment regarding defendants' fifth counterclaim is denied. The portion of plaintiff's motion for summary judgment regarding its first and second causes of action is denied. The portion of plaintiff's motion for summary judgment on defendants' third counterclaim is denied. The portion of plaintiff's motion for summary judgment regarding defendants' first, second, and fourth counterclaims is granted. The portion of plaintiff's motion to dismiss regarding defendants' first through sixth affirmative defenses is granted.

Accordingly, it is ORDERED that the branch of plaintiff's motion for summary judgment on its first and second causes of action is denied; it is further

ORDERED that the branch of plaintiff's motion for summary judgment regarding defendants' third and fifth counterclaim is denied; it is further

ORDERED that the branch of plaintiff's motion for summary judgment on defendants' first, second, and fourth counterclaims is granted; it is further

ORDERED that the branch of plaintiff's motion to dismiss defendants' first through sixth affirmative defenses is granted; it is further

ORDERED that defendants' request to amend their answer is denied; and it is further

ORDERED that the Clerk of the Court enter judgment as written.

This constitutes the Decision and Order of the court.

10/17/2019
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	