SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA ANNE CRANE** **PART** **IAS MOTION 15EFM**

Justice

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NEIVENS, NINA

Plaintiff,

- v -

24-26 EAST 93 APARTMENTS CORP.

Defendant.

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INDEX NO. 651888/2017

MOTION DATE N/A, N/A

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 68, 71, 80, 84

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

The following e-filed documents, listed by NYSCEF document number (Motion 003) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 69, 72, 81, 82, 83

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

Upon the foregoing documents, it is

The court consolidates motion sequence nos. 002 and 003 for disposition.

Defendant 24-26 East 93 Apartments Corp. (the Coop) moves for an order (motion seq. No. 002), pursuant to CPLR 3212, for summary judgment dismissing the complaint and granting its first and third counterclaims: (1) declaring that plaintiffs are not entitled to the exclusive use of any area of the roof of the building located at 24-26 East 93rd Street, New York, New York (the Building), except above their own apartments known as 10AB and 10CD where they have constructed two greenhouses; and (2) directing plaintiffs to remove items placed on the roof outside the greenhouses, enjoining them from placing any other items on the roof without first obtaining Coop permission, and

enjoining them from excluding other shareholders of the Building from using the roof outside the greenhouses.

Plaintiffs also move for summary judgment (motion seq. No. 003): (1) on their complaint seeking a declaration that they are entitled to exclusive use of the areas of the roof of the Building appurtenant to the greenhouses of their apartments; and (2) dismissing the first, second, fourth, sixth, and eighth counterclaims.

Plaintiff Nina Neivens (Nina) brings this action individually, and as temporary administrator for the Estate of Mary Neivens (Mary), her late mother, seeking declarations regarding her rights to exclusive use of the roof of the cooperative Building in which she is the proprietary lessee of two apartments known as 10AB and 10CD. [1] Over 30 years ago, plaintiffs had obtained from defendant Coop the right to construct temporary greenhouses on the roof immediately above their two apartments, that are directly accessible from inside their apartments. They now claim that their apartments are penthouse apartments and seek a declaration that they had obtained exclusive use of the entire rooftop area outside of the temporary greenhouses. The Coop contends that it is undisputed that plaintiffs' apartments are not penthouse apartments, the proprietary lease only affords appurtenant rooftop space to penthouse apartments, and the amendment to the offering plan that granted plaintiffs the right to construct the temporary greenhouses did not include the rooftop space outside of such greenhouses. Both parties move for summary judgment.

BACKGROUND

In 1984 and 1985, the Building was converted to cooperative ownership and an Offering Plan was filed with the New York State Department of Law and became effective in May 1986 (the Offering Plan) (NYSCEF Doc. No. 3, amended answer, ¶¶ 24-27). The Offering Plan identifies, among other things, the apartments in the Building and the shares allocated to them (NYSCEF Doc. No. 32, Offering Plan, Schedule A). Some of the apartments listed contain a designation "G" for garden use, or "T" for terrace (*id.*). None of the apartments are designated as penthouse apartments (*id.*).

Under the terms of the Offering Plan, the Coop owned and controlled the common areas, including the roof and basement of the Building. The Offering Plan did not disclose any plans, nor did it reserve development rights for the benefit of the sponsor, nonparty White Friars East (Sponsor), for any greenhouses or penthouses on the roof (NYSCEF Doc. No. 30, affidavit of Susan Lyne, dated September 5, 2019 [Lyne aff], ¶ 7; NYSCEF Doc. No. 32, Offering Plan).

Plaintiffs are holders of unsold shares in the Building, as successors-in-interest to shares Dennis Neivens, a partner in the Sponsor and plaintiff Mary Neiven's husband and Nina's father previously held (NYSCEF Doc. No. 30, Lyne aff, ¶ 4). Plaintiff Nina owns the 1715 shares allocated to, and is the proprietary lessee of, apartment 10CD, and both plaintiffs are the joint owners of the 1720 shares allocated to, and are the proprietary lessees of, apartment 10AB in the Building (NYSCEF Doc. No. 1, complaint, ¶¶ 4-5). Earlier, the original apartments 10A, 10B, 10C, and 10D were combined into 10AB and 10CD. None of these apartments contained any designation of "G" or "T" and were not indicated as penthouses in the Offering Plan (see NYSCEF Doc. No. 32, Offering Plan,

Schedule A). Plaintiff Mary Neivens was a member of the Coop Board until 2011 when she retired from the Board. Plaintiff Nina became a Board member in 2011, and remains a member (see NYSCEF Doc. No. 46, deposition of Mary Neivens, dated March 6, 2019 [Mary tr], at 59-60; NYSCEF Doc. No. 47, deposition of Nina Neivens, dated March 8, 2019 [Nina tr], at 37-38).

The proprietary leases applicable to all apartments in the Building (the Lease) defined "apartment" to mean,

> "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. 36, Lease, preamble at 1). Paragraph 7, entitled "Penthouse, Terraces and Balconies," provided, in part, that:

> "[i]f 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 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, structure 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.*). This paragraph also granted the Coop a right of access to the roof to install and repair equipment (*id.*).

In July 1989, at Dennis Neivens' request, the Sponsor submitted for filing a Fourth Amendment to the Offering Plan (Fourth Amendment), that authorized the construction of two greenhouse structures on the Building's roof for use by the owners of apartments 10AB and 10CD (NYSCEF Doc. No. 30, Lyne aff, ¶ 8; NYSCEF Doc. No. 33, Fourth Amendment). The Fourth Amendment increased the number of shares allocated to apartment 10A from 1185 to 1295, and increased the number of shares allocated to apartment 10C from 810 to 920 (110 additional shares to each apartment for the use of the greenhouses) (NYSCEF Doc. No. 30, Lyne aff, ¶ 8). It attached a letter of reasonable relationship, relating to this increase in shares, from Leo Seitelman, a licensed real estate broker, stating that each greenhouse would be approximately 20' by 20' and that it was reasonable to allocate 110 additional shares to each apartment in connection with the greenhouses (NYSCEF Doc. No. 33, Fourth Amendment, ¶ 1; NYSCEF Doc. No. 30, Lyne aff, ¶ 10).

The greenhouses were constructed, and each was accessible by an interior stairway inside each apartment, and each had doors that opened onto the roof (see NYSCEF Doc. No. 51, deposition of Frederick Rudd, dated May 30, 2019 [Rudd tr], at 39). The roof otherwise is accessible through two public fire stairwells, one on the west and one on the east side of the roof (*id.*). Plaintiffs had plants and furniture inside the greenhouses and placed some furniture on the roof outside of the greenhouses (NYSCEF Doc. No. 30, Lyne aff, ¶ 13).

In 2014, plaintiffs and the Coop began negotiating the plaintiffs' prospective purchase of the right to remove the greenhouse and construct permanent penthouses in their place, but the negotiations ended in 2017 without agreement (*id.*, ¶ 12).

In April 2017, plaintiffs commenced this action, seeking (the first cause of action) a declaration that the Coop's threats to revoke their exclusive use of the roof contravene paragraph 7 of the Lease, and that plaintiffs have exclusive use of the roof area appurtenant to both apartments 10AB and 10CD (NYSCEF Doc. No. 1, complaint, ¶¶ 21-28). They also seek an injunction (the second cause of action), enjoining the Coop from revoking their exclusive use of the roof and from converting it to communal space (*id.*, complaint, ¶¶ 29-34).

The Coop answered the complaint, denying the material allegations, and asserted eight counterclaims. The first counterclaim seeks a declaration that plaintiffs are not entitled to exclusive use of the roof. The second and third counterclaims seek money damages and an injunction, respectively, based on plaintiffs' alleged continuing trespass with respect to the roof. The fourth and fifth counterclaims allege that plaintiffs are trespassing the basement by using and storing items there without Coop permission, seeking money damages and an injunction. The sixth counterclaim alleges a breach of fiduciary duty by plaintiffs as directors on the Coop Board, based on their alleged trespasses. The seventh counterclaim seeks an injunction to cure the plaintiffs' breaches of their proprietary leases. Finally, the eighth counterclaim seeks attorneys' fees and costs as the prevailing party (NYSCEF Doc. No. 3, amended answer).

In moving for summary judgment dismissing the complaint and on its first and third counterclaims, the Coop argues that plaintiffs have no right to exclusive roof access. Under the Offering Plan (Schedule A) and contrary to plaintiffs' assertions, the two apartments are not penthouse apartments, and, in fact, there are no penthouse apartments in the Building. It contends that the evidence demonstrates, and plaintiffs admit, that the greenhouses are temporary 20' by 20' structures, not penthouses. The Coop urges that paragraph 7 of the Lease only grants exclusive use of the roof to apartments with "a terrace, balcony, or portion of the roof adjoining a penthouse" which the apartments admittedly were not (NYSCEF Doc. No. 39, Coop memorandum in support of motion seq. No. 002, at 6 [emphasis in original]). Moreover, it contends that the rooftop area outside of the temporary greenhouses is not "appurtenant" to the apartments. It further urges that the Fourth Amendment did not transform the apartments into penthouses. Instead, it simply gave plaintiffs the right to build "greenhouses" atop of their apartments and nothing more. To the extent that plaintiffs have kept some personal items on the roof and claim that they have exclusively used it, the Coop contends that this use permitted by the Coop was simply as a licensee, which is revocable and has been revoked.

In opposition and in support of their motion, plaintiffs contend that the definition of the word "apartment" and paragraph 7 of the Lease unambiguously give them the right of exclusive use of the entire roof as appurtenant to their apartments. They also urge that the Fourth Amendment supports this. That amendment established that extra shares were allocated to their apartments for the purpose of constructing the greenhouses on the roof. Thus, they argue that these governing documents unambiguously establish that they paid

for, and acquired the right to, the exclusive use of the entire roof. Plaintiffs further urge that their placement of tables, chairs, and a walking surface on the roof outside the footprint of the greenhouses demonstrates that they were putting the Fourth Amendment into effect. To the extent that any ambiguity is found in the Coop's governing documents, plaintiffs contend that the fact that the roof was accessed through doors from the greenhouses, and that they had maintenance and repair responsibilities for the roof, show that they had the right to exclusive use.

On the counterclaims, plaintiffs urge that the second counterclaim for trespass fails, because they have established their exclusive right to use the roof and, thus, cannot be trespassers. Regarding trespass in the basement (the fourth counterclaim), they argue that the Coop failed to name a necessary party -- the Sponsor, which is the commercial space tenant whose subtenants used some of the basement space. They assert that the breach of fiduciary duty counterclaim (the sixth counterclaim) must fail, because plaintiff Mary Neivens has not been a member of the Board for at least six years so there is no fiduciary relationship. As against plaintiff Nina, they argue that there are no allegations that she breached any duty other than, and independent of, her duties as a Board member, and the documents support her exclusive right to use the roof, and the use of the basement by the Sponsor. Finally, plaintiffs urge that the Coop is not entitled to attorneys' fees and costs, but that they, instead, are entitled to such fees and costs as the prevailing party.

DISCUSSION

The Coop's motion for partial summary judgment (motion seq. No. 002) is granted. Plaintiffs' motion for summary judgment (motion seq. No. 003) on their complaint is denied, and dismissal of the counterclaims is granted only on the sixth counterclaim as against plaintiff Mary Neivens.

The movant on a motion for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law, submitting admissible evidence demonstrating the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If it fails to make such a showing, the motion is denied regardless of the sufficiency of the opposing papers (*id.*). If the movant meets its burden, then the opposing party must present sufficient admissible evidence raising a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). All reasonable inferences must be drawn in favor of the nonmoving party, and the motion will be denied if there is any doubt as to the existence of a material issue of fact *(Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC*, 157 AD3d 479, 482 [1st Dept 2018]).

The issues in this case turn on the interpretation of the written agreements governing the apartments and the rights of proprietary lessees regarding the roof and basement in the Building. Where a contract is unambiguous, its meaning is a question of law for the court (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Generally, "when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms [and extrinsic evidence] is generally

inadmissible to add to or vary the writing" (*id.*). "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). An agreement is unambiguous, if its language "has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*id.* [internal quotation marks and citation omitted]).

Where an action involves whether "the roof area in question is not part of the demised [A]partment," the controlling documents are "the offering plan, building plans and the proprietary lease" (*1050 Fifth Ave. v May*, 247 AD2d 243, 243 [1st Dept 1998]; *see Fairmont Tenants Corp. v Braff*, 162 AD3d 442, 442 [1st Dept 2018]; *Rotblut v 150 E. 77h St. Corp.*, 79 AD3d 532, 532 [1st Dept 2010] [controlling documents are "the offering plan, amendments to the plan and proprietary lease"]; *Prospect Owners Corp. v Sandemeyer*, 62 AD3d 601, 602 [1st Dept 2009]).

Here, the facts material to determining the parties' claims are essentially undisputed, and turn on the interpretation of the governing documents – the Offering Plan, the Fourth Amendment, and the Lease (*see Fairmont Tenants Corp. v Braff*, 162 AD3d at 442; *Rotblut v 150 E. 77th St. Corp.*, 79 AD3d at 532). The Offering Plan identifies apartments with terraces with a capital "T," and with gardens with a capital "G," and apartments 10AB and 10CD lack these designations. The Offering Plan does not designate any apartment in the Building as a penthouse apartment (NYSCEF Doc. No. 32, Offering Plan, Schedule A).

The Fourth Amendment to the Offering Plan clearly afforded plaintiffs only with the right to build "greenhouses," measuring 20' by 20' each and nothing more (NYSCEF Doc. No. 53, Fourth Amendment with attached letter of reasonable relationship). It specifically stated "[i]n connection with the construction of greenhouses on the roof," and did not mention penthouses (NYSCEF Doc. No. 53, Fourth Amendment at 1). If the parties had intended to convert these two apartments into penthouses with the right to exclusively use the entire roof of the Building, substantially increasing the amount of Building space exclusively available to the owners of apartments 10AB and 10CD, they should have expressly said so. In addition, the additional space would have been calculated in the additional shares that were allotted to and paid for by plaintiffs, but it was not (see *id.*).

Plaintiffs' contention that paragraph 7 of the Lease gives them the exclusive right to the entire roof is unavailing. Because apartments 10AB and 10CD do not "include a terrace, balcony or a portion of the roof adjoining a penthouse" (NYSCEF Doc. No. 36, Lease, ¶ 7), plaintiffs do not have the exclusive right to use, occupy or enjoy the roof (*see Fairmont Tenants Corp. v Braff*, 2017 NY Slip Op 32119[U], at * 4 [Sup Ct, NY County 2017], *affd* 162 AD3d at 442; *1050 Fifth Ave. v May*, 247 AD2d at 243). While plaintiffs also point to the definition of "apartment" in the Lease preamble to support their argument, the Offering Plan, along with its Fourth Amendment, gives that Lease provision meaning, and makes clear, as discussed above, that there is no roof space, other than the greenhouses themselves, allocated exclusively to plaintiffs' apartment (*Fairmont*

Tenants Corp. v Braff, 162 AD3d at 442; *see also Palmer v WSC Riverside Dr., LLC*, 61 AD3d 589, 589 [1st Dept 2009]).

Plaintiffs further argue that the entire roof area outside the greenhouses is appurtenant to their apartments. This argument is unpersuasive. 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 quotation marks and citation omitted]; *see Board of Mgrs. of 500 W. End Condominium v Ainetchi*, 84 AD3d 603, 604 [1st Dept 2011] [exterior terrace area adjacent to penthouse unit was not appurtenant because it was not essential nor reasonably necessary to use and enjoy the unit]; *Prospect Owners Corp. v Sandmeyer*, 62 AD3d at 603). Mere convenience in the use and enjoyment of space does not create an appurtenance. An appurtenance may only be revoked at the termination of the lease (*Prospect Owners Corp. v Sandmeyer*, 62 AD3d at 603).

Here, the roof outside of the greenhouses was not, as plaintiffs contend, granted exclusively to plaintiffs in the Lease, the Offering Plan, or the Fourth Amendment. It also was not essential or reasonably necessary to use and enjoy either the apartments or the greenhouses. The apartments are not connected to this rooftop area, and while the greenhouses have a door to the roof, they both are accessible from internal staircases in each of the apartments (NYSCEF Doc. No. 51, Rudd tr at 39; NYSCEF Doc. No. 38, deposition of Carol Friscia, dated May 15, 2019 [Friscia tr] at 56). In addition, a rooftop is not appurtenant to an apartment unit located below it (*see Prospect Owners Corp. v*

Sandmeyer, 62 AD3d at 603 [roof not appurtenant to apartment]; *Rushmore v Park Regis Apartment Corp.*, 2018 NY Slip Op 31335[U], at * 3 [Sup Ct, NY County 2018] [use of roof not necessary for use and enjoyment of apartment unit immediately below it]; *Huyck v 171 Tenants Corp.*, 2018 NY Slip Op 33026[U], at * 6 [Sup Ct, NY County 2018] [penthouse owners entitled to exclusive use of portion of roof on level of their apartment but not any space above it]). Use of the rooftop area by plaintiffs for outdoor furniture and storage is not essential to the plaintiffs' use of their apartments below the roof or of the greenhouses (*see Prospect Owners Corp. v Sandmeyer*, 62 AD3d at 603 [tenant's main use of roof for storage and recreation was not appurtenant to apartment]; *Oberfest v 300 W. End Ave. Assoc.*, 34 Misc 2d 963, 965 [Sup Ct, NY County 1962] [use of basement storage space was for tenant's convenience and not appurtenant]; *Oceana Holding Corp. v Atlantic Oceana Co.*, 4 Misc 3d 1029[A], 2004 NY Slip Op 51122[U], at * 10-12 [Civ Ct, Kings County 2004][restaurant lessee's use of basement for storage, use of parking garage for customers, and use of second floor for parties was neither reasonably necessary nor essential]).

The external roof area was not included in the demised premises, and plaintiffs' use was pursuant to a license. A lease grants exclusive possession of a designated space to the lessee. In contrast, a license connotes only "use or occupancy of the grantor's premises," and it is revocable (*Prospect Owners Corp. v Sandmeyer*, 62 AD3d at 602 [internal quotation marks and citation omitted]; *Kohman v Rochambeau Realty & Dev. Corp.*, 17 AD3d 151, 153 [1st Dept 2005] [license is personal, revocable privilege to act upon land without possessing an interest in the land]; *American Jewish Theatre v*

Roundabout Theatre Co., 203 AD2d 155, 156 [1st Dept 1994] [license indicates use or occupancy revocable at will by grantor; lease grants exclusive possession of designated space to lessee]).

Kiam v Park & 66th Corp. (66 AD3d 415 [1st Dept 2009]) is distinguishable. *Kiam* involved whether the plaintiff had the exclusive right to use roof space that was appurtenant to his penthouse apartment, and whether he had improperly constructed a sunroom on that roof area without written approval of the cooperative board. The Court held that the plaintiff's ownership of a penthouse afforded him rooftop space under the proprietary lease. Moreover, in that case defendants knew and never challenged the construction of the sunroom which supported the trial court's finding that the cooperative board waived requirement for written approval in the lease (*id.* at 415-416). The *Kiam* court did not hold that construction of the sunroom implied a right to rooftop space as appurtenant to an apartment. Here, plaintiffs did not have penthouse apartments under the governing documents and by their own admissions (see NYSCEF Doc. No. 37, Nina tr at 58-63 [admitting that in 2014 they were actively negotiating the right to build penthouses atop their apartments], 73-74 [admitting that Fourth Amendment does not state that greenhouses would be treated as penthouses]). *Rose v 115 Tenants Corp.* (150 AD3d 472 [1st Dept 2017]) and *Gracie Terrace Apt. Corp. v Goldstone*, (103 AD2d 699 [1st Dept 1984]), upon which plaintiffs rely, similarly involve penthouse apartments, and the proprietary lessee's right to exclusive use of a portion of an adjoining roof.

Plaintiffs' affirmative defenses asserted in their reply to the counterclaims fail to raise any issues of fact. The defenses of failure to state a claim and documentary

evidence are insufficient. The relevant documents demonstrate that plaintiffs have no right to exclusive use of the rooftop.

Plaintiffs' statute of limitations defense is conclusory and plainly does not apply to the first and third counterclaims which reference plaintiffs' actions in placing personal items on the rooftop in 2016 (NYSCEF Doc. No. 37, Nina tr at 50-51, 56-60), and plaintiffs' claims, at a Coop Board meeting in June 2015, that they had the right to exclusive access to the roof (*id.*, Nina tr at 59). These fall within the six-year limitations period for declaratory judgments and injunctions under CPLR 213(1) (*see Zwarycz v Marnia Constr., Inc.*, 102 AD3d 774, 776 [2d Dept 2013] [declaratory judgment]; *Foti v Noftsier*, 72 AD3d 1605, 1607 [4th Dept 2010] [injunctive relief subject to six-year limitations period under CPLR 213[1]; *see also Stein v Garfield Regency Condominium*, 65 AD3d 1126, 1127 [2d Dept 2009] [condominium unit owners seeking declaratory judgment and injunction that they had exclusive rights to roof area under 1986 declaration; claims subject to six year limitations period and did not accrue in 1986, but in 2005 when corporation challenged those rights]).

Plaintiffs' defenses of waiver or estoppel are insufficiently pled (*Carlyle, LLC v Beekman Garage LLC*, 133 AD3d 510, 511 [1st Dept 2015] [bare legal conclusions are insufficient to raise an affirmative defense]; *Robbins v Growney*, 229 AD2d 356, 358 [1st Dept 1996] [same]). In addition, the no waiver provision in the Lease bars plaintiffs' defense of waiver (NYSCEF Doc. No. 36, Lease, ¶ 26). It is undisputed that the Coop did not give explicit written permission to use the roof area outside of the greenhouses

(*see Jossel v Filicori*, 235 AD2d 205, 206 [1st Dept 1997]; *Fairmont Tenants Corp. v Braff*, 2017 NY Slip Op 32119[U], at * 4).

Plaintiffs' sixth affirmative defense that they obtained the Coop's consent is not a sufficient defense as there was no right to exclusive use under the operating documents and that plaintiffs' use was as licensees, which rights were revocable (*see Kohman v Rochambeau Realty & Dev. Corp.*, 17 AD3d at 153).

The seventh affirmative defense asserts that the Coop failed to name a necessary party, which plaintiffs assert only against the fourth counterclaim, and is determined below. The eighth affirmative defense that the counterclaims are "barred by res judicata and collateral estoppel" is merely a legal conclusion and plaintiffs fail to present any facts to support this defense (*see Kingman v Zmoore Ltd.*, 2018 NY Slip Op 32029[U], at * 8 [Sup Ct, NY County 2018] [conclusory affirmative defense of res judicata and collateral estoppel plead as a conclusion of law and not factually supported is struck as insufficient]). The ninth affirmative defense addresses only the sixth counterclaim and is determined below. Finally, the tenth affirmative defense addresses only the seventh counterclaim which is not challenged on either of these summary judgment motions.

Therefore, the court grants the Coop's motion for partial summary judgment dismissing the complaint, and on its first and third counterclaims. The branch of plaintiffs' motion for summary judgment on their complaint, and for dismissal of these counterclaims, is denied. It is declared that plaintiffs do not have a leasehold interest under their proprietary leases to occupy, use or enjoy the rooftop area outside of the greenhouses atop their apartments 10AB and 10CD, and the Coop has the right, title and

interest to the entire roof of the building located at 24-26 East 93rd Street, New York, New York, except for the area directly under the greenhouses atop apartments 10AB and 10CD (complaint and first counterclaim).

The Coop also is granted to an injunction (third counterclaim), based on plaintiffs' continuing trespass of the roof area outside the greenhouses. To establish a claim for civil trespass, the plaintiff must show that the defendant entered upon the plaintiff's land without permission or justification (*Schwartz v Hotel Carlyle Owners Corp.*, 132 AD3d 541, 542 [1st Dept 2015]; *see Burger v Singh*, 28 AD3d 695, 698 [2d Dept 2006]). The Coop has established that it is likely to succeed on its continuing trespass claim regarding the roof, and that plaintiffs are not entitled to exclusive use of the area under the operating documents, and have been directed to remove their items, but have refused. The Coop also has established irreparable injury if plaintiffs exclusively use the entire roof, a common area owned by the Coop, and all other shareholders are excluded. The equities are in the Coop's favor since it will suffer more harm if this common area is given exclusively to plaintiffs, and plaintiffs will only suffer by having to remove and store their furniture and items elsewhere. Plaintiffs, and any guests or invitees of plaintiffs, are enjoined from occupying or using the roof area outside of the greenhouses directly atop apartments 10AB and 10CD of the building located at 24-26 East 93rd Street, New York, New York, are directed to remove any items they have placed there, and are enjoined from placing any other items on the roof without first obtaining Coop permission and from excluding other shareholders of the Building from using the roof outside the greenhouse (*see Fairmont Tenants Corp. v Braff*, 2017 NY Slip Op 32119[U],

at * 4 [granting a declaratory judgment and enjoining shareholder from using terrace space where lease and offering plan did not designate the apartment as entitled to such space]; *see also Long Is. Gynecological Servs. v Murphy*, 298 AD2d 504, 505 [2d Dept 2002] [injunction may be granted on establishment of continuing civil trespass]). Plaintiffs' demand for dismissal of the second counterclaim for trespass with respect to the roof area, seeking money damages, also is denied. Again, the Lease and Fourth Amendment did not give them the exclusive right to use that area, and their use could constitute a civil trespass.

The branch of plaintiffs' motion dismissing the fourth counterclaim (trespass in connection with plaintiffs' use of basement space) for failure to join a necessary party is denied. CPLR 1001 (a) provides that:

> "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so he may be made a defendant."

First, contrary to plaintiffs' contention, dismissal for failure to name a necessary party is a last resort. Instead, the statute directs that the court order the party joined if he or she is subject to the court's jurisdiction (*Windy Ridge Farm v Assessor of Town of Shandaken*, 11 NY3d 725, 726 [2008]; *Goldberg v Torim*, 2019 NY Slip Op 30002[U], at * 4 [Sup Ct, NY County 2019], *affd* 181 AD3d 443 [1st Dept 2020]). Second, plaintiffs' argument that the Sponsor is a necessary party because it, and its commercial subtenants, have the rights to the basement, is unavailing. The relief the Coop seeks for trespass of the basement is solely against the plaintiffs. The Sponsor would not be bound by any

trespass related judgment against plaintiffs, and plaintiffs fail to explain how it would be inequitably affected. Dismissal of this fourth counterclaim is denied.

The sixth counterclaim alleges breach of fiduciary duty against both plaintiffs based on the allegations of their trespass of both the rooftop and the basement areas. It is well-settled that members of a corporate board of directors "owe a fiduciary responsibility to the shareholders in general and to individual shareholders in particular to treat all shareholders fairly and evenly" (*Schwartz v Marien*, 37 NY2d 487, 491 [1975]). The board of a residential cooperative corporation has a fiduciary duty to the proprietary lessees, and where it is alleged that board members or individual officers have violated such fiduciary duties, an individual breach of fiduciary duty claim may be maintained against such persons (*see Ramos v 24 Cincinatus Corp.*, 104 AD3d 619, 620 [1st Dept 2013]; *Fletcher v Dakota, Inc.*, 99 AD3d 43 [1st Dept 2012]; *cf. Hersh v One Fifth Ave. Apt. Corp.*, 163 AD3d 500, 500 [1st Dept 2018] [where no independent tort committed by individual board member that was distinct from actions taken collectively by board, no viable breach of fiduciary duty claim]). The plaintiff challenging the board's actions must show the existence of the fiduciary relationship, misconduct by the individual board member, and damages directly caused by the misconduct (*DeMartino v Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP*, __ AD3d __, 2020 NY Slip Op 07163, at * 1 [2d Dept 2020]; *Rushmore v Park Regis Apartment Corp.*, 2018 NY Slip Op 31335[U], at * 4-5).

Here, contrary to plaintiffs' argument, the Coop has alleged misconduct based on plaintiffs' trespass of the Building's rooftop and areas in the basement. As determined

above, plaintiffs had no right to exclusive use of the roof, and the Coop alleges that the plaintiffs' storage of personal property in both areas was without authority or written permission. The Coop further alleges that by committing these torts of trespass, plaintiffs have placed their own interests above those of the Coop and other shareholders. This may constitute a breach of fiduciary duty (*see Birnbaum v Birnbaum*, 73 NY2d 461, 466 [1989] ["fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect"]).

This counterclaim as against plaintiff Mary Neivens, however, is dismissed as untimely. A claim for breach of fiduciary duty accrues upon the fiduciary's commission of wrongful acts, that is, once damages are sustained (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 140 [2009]; *see Cusimano v Schnurr*, 137 AD3d 527, 530-531 [1st Dept 2016] [when seeking money damages for breach of fiduciary duty, the claim accrues upon the fiduciary's commission of wrongful acts]). The limitations period for such a claim is three years where, as here, money damages are sought (*see* CPLR 213 [1], 214 [4]; *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d at 139; *Lebedev v Blavatnik*, 144 AD3d 24, 29 [1st Dept 2016]). It is undisputed that plaintiff Mary Neivens retired from the Board in 2011, so her wrongful acts were committed no later than that date, which is more than three years before the commencement of this action in 2017. Therefore, the sixth counterclaim is dismissed as against her.

Finally, dismissal of the eighth counterclaim in which the Coop seeks attorneys' fees and costs as the prevailing party in accordance with paragraph 28 of the Lease is denied (NYSCEF Doc. No. 3, amended answer, ¶¶ 78-81; NYSCEF Doc. No. 36, Lease,

¶ 28). As determined above, the counterclaims have merit and in light of the declaratory and injunctive relief awarded here, plaintiffs fail to present a basis for dismissal of this counterclaim.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted; and it further

ORDERED that the plaintiffs' motion for summary judgment is granted only to the extent that the sixth counterclaim is dismissed as against plaintiff Mary Neivens, and is otherwise denied; and it is further

ADJUDGED and DECLARED that defendant has the right, title and interest to the roof area outside of the greenhouses atop apartments 10AB and 10CD of the building located at 24-26 East 93rd Street, New York, New York and plaintiffs do not have a leasehold interest under their proprietary leases to occupy, use or enjoy said roof area outside of their greenhouses; and it is further

ORDERED that plaintiffs and any guests or invitees of plaintiffs are enjoined from occupying or using the roof area outside of their greenhouses atop their apartments 10AB and 10CD of the building located at 24-26 East 93rd Street, New York, New York, and plaintiffs are directed to remove items they placed on the roof, and are enjoined from placing other items there without first obtaining Coop permission, and from excluding other shareholders of the building from using the roof outside the greenhouses.

The parties are directed to attend a conference, over Microsoft teams, on March 5, 2021 at noon.

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2/24/2021
DATE

MELISSA ANNE CRANE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE