SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

---X Index No: 157316/2014

J. ARMAND MUSEY,

Plaintiff,

-against-

425 EAST 86 APARTMENTS CORP., DOUGLAS ELLIMAN PROPERTY MANAGEMENT, FRANK CHANEY, PATRICIA CARBON, DAVID MUNVES, MICHAEL CONSIDINE, SUZANNE KEAN, JENNIFER KRUEGER, GEORGE GREENBERG, ALEXANDER SHAPIRO and LESLIE SPITALNICK,

Defendants.

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REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION FOR LEAVE TO AMEND COMPLAINT AND FOR LEAVE TO REARGUE PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT 425 EAST 86 APARTMENTS CORP.'S CROSS-MOTION SEEKING LEAVE TO REARGUE

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Plaintiff J. Armand Musey ("Plaintiff" or "Musey") respectfully submits this reply memorandum of law in further support of his motion: (i) pursuant to CPLR § 3025 for leave to amend his Complaint dated July 25, 2014 to further define his claims against 425 East 86 Apartments Corp. (the "Co-op") for breach of contract, breach of the warranty of habitability, and declaratory relief; (ii) to reargue portions of this Court's decision and order dated July 16, 2015 (the "Order") pursuant to CPLR § 2221, to the extent that this Court misconstrued Plaintiff's request for a declaration enforcing the Proprietary Lease (the "Proprietary Lease") as an attempt to amend the Co-op's Roof Rules (together, Plaintiff's "Motion"); and (iii) in opposition to the Co-op's cross-motion for leave to re-argue the Order (the "Cross-Motion").

Preliminary Statement

Rather than demonstrating that it can meet the standard required to successfully defeat Plaintiff's motion for leave to amend -- and in fact it cannot -- the Co-op utilizes irrelevant and misleading arguments along with distracting word-play to support its position. For example, instead of calling the terrace at issue a "terrace," the Co-op's brief refers to it by no fewer than five separate euphemisms to diminish Plaintiff's exclusive rights to the terrace: roof, roof terrace space, roof space, or roof top space, service roof and further accuses Plaintiff of trying to make the Co-op pay for a purported "entertainment terrace." Stripping out the wordplay, which also includes intentionally misquoting (or at a minimum, demonstrating a misunderstanding of) a portion of this Court's Order, the Co-op's main contention appears to be that Plaintiff himself is guilty of a breach of contract. At most, this alleged breach of contract creates a factual issue to be resolved through discovery and provides no basis to deny Plaintiff's motion to amend the complaint. Despite the Co-op's strained efforts to fashion an argument to oppose amendment, Plaintiff's proposed amended complaint (the "First Amended Complaint"), is sufficient and

meritorious. Nor does Plaintiff's supposed breach of contract, an argument raised for the first time here, support its Cross-Motion to reargue, since the Court had no opportunity to consider the argument prior to issuing the Order. Further, notwithstanding the Co-op's contentions to the contrary, the appellate decision rendered in *Shapiro* is entirely relevant to this case and demonstrates Plaintiff's entitlement to seek leave to reargue this Court's dismissal of a portion of his claim for declaratory relief.

STATEMENT OF FACT

The relevant facts with respect to Plaintiff's Motion and the Co-op's Cross-Motion are set forth in Plaintiff's opening memorandum of law ("Plaintiff's Brief"), the Affidavit of Armand Musey submitted with Plaintiff's Brief (the "Musey Affidavit"), and the Reply Affidavit of Armand Musey, sworn to on October 1, 2015 (the "Musey Reply Aff.").[1] The Court is respectfully referred to these filings for a complete statement of the relevant facts. However, with respect to the facts stated in the Co-op's papers filed in opposition to the Motion, Plaintiff must clarify one fact in order to address a misstatement set forth in the Co-op's motion papers: Plaintiff is not seeking, and has never sought, to hold the Co-op responsible for any part of the decoration or design of his terrace. Musey Reply Aff. ¶ 2. This includes installation of decking or pavers. *Id.* Plaintiff's main issue is one underscored by the Co-op's own statements in its

[1] Interestingly, the Co-op denies having ever alleged that Plaintiff does not have exclusive use of the terrace appurtenant to the Unit. Brief in Support of Cross-Motion, ("Co-op Brief"), p. 7, fn. 5. However, this adamant denial is belied by: (i) the Co-op's Memorandum of Law in Support of Motion to Dismiss, wherein at page 9, the Co-op denies that the Proprietary Lease states that the terrace is allocated exclusively to the Unit and (ii) Co-op's Reply Memorandum of Law in Further Support of Motion to Dismiss and in Opposition to Plaintiff's Cross-Motion For Partial Summary Judgment and Other Relief, wherein at page 7, footnote 5, the Co-op, at some length, explains that terrace is not appurtenant to the Unit and therefore, not, as the Proprietary Lease states, "allocated exclusively to the occupant of the apartment." Krieg Reply Aff., ¶¶ 2-3, Ex. 1 and 2. Further, at the April 1, 2015 oral argument held before this Court, counsel for the Co-op denied very clearly in open court Plaintiff's right to exclusive use of the terrace. Krieg Reply Aff., ¶ 4, Sugarman Reply Aff, ¶ 2, Musey Reply Aff, ¶ 4. This conduct necessitates the declaratory relief sought in the Amended Complaint and is certainly the type of conduct which would fall within the definition of frivolous conduct under 22 NYCRR Part 130-1.1.

papers filed in this motion sequence in addition to its papers filed in support of its motion to dismiss: that what the Co-op has provided Plaintiff is, at most, a non-trafficable, delicate surface and not a usable terrace. *Id.* at ¶ 2. In so doing, the Co-op has deprived Plaintiff of his right to a terrace for his exclusive use in a form intended for ordinary use, including walking.

ARGUMENT

POINT I

PLAINTIFF SHOULD BE GRANTED LEAVE TO REPLEAD AS THE CO-OP FAILS TO EVEN ARGUE, LET ALONE DEMONSTRATE THAT IT WILL BE PREJUDICED BY THE PROPOSED FIRST AMENDED COMPLAINT AND FURTHER FAILS TO DEMONSTRATE THAT THE FIRST AMENDED COMPLAINT IS INSUFFICIENT OR DEVOID OF MERIT

A party opposing a motion for leave to amend must demonstrate prejudice or surprise. [*Fahey v. County of Ontario*, 44 N.Y.2d 934 (1978) ("leave to amend shall be freely given absent prejudice or surprise resulting directly from the delay")], and that the proposed amended pleading is palpably devoid of merit. *MBIA Ins. Corp. v. Greystone & Co., Inc.,* 74 A.D.3d 499, 500 (1st Dept. 2010) (citations omitted). The Co-op, which does not even argue that it will be prejudiced by the proposed amendment, fails to meet its burden.

A. The Co-op Has Failed to, Because it Cannot, Demonstrate that it Will Suffer Prejudice if Leave to Amend the Complaint is Granted

The burden of establishing prejudice is on the party opposing the amendment. *Caceras v. Zorbas*, 74 N.Y.S.2d 884, 885 (1989); 1A West's McKinney's Forms, CPLR 4:571 (McKinney's 2003) (citing, Practice Commentary 3025:4, 3025:6 under CPLR § 3025). Prejudice is more than "the mere exposure of the [party] to greater liability." *Kimso Apts., LLC v Gandhi,* 24 N.Y.3d 403, 411 (2014) (quoting *Loomis v Civetta Corinno Const. Corp.*, 54 N.Y.2d 18, 23 (1981)). Rather, "there must be some indication that the [party] has been hindered in the preparation of [the party's] case or has been prevented from taking some measure in support of

[its] position" *Id.* The Co-op's opposition is bereft of even an attempt to argue that it will be prejudiced if Plaintiff files the First Amended Complaint. Indeed, the Co-op did not argue prejudice because it will not be prejudiced in any way by Plaintiff's proposed First Amended Complaint, which seeks to add causes of action for: breach of the proprietary lease and injunctive relief, and to amend the causes of action for declaratory relief and breach of the warranty of habitability. Plaintiff's Brief, pp. 10-11. As such, the Co-op's opposition must fail for this reason alone.

B. The Co-op Has not, Because it Cannot, Demonstrate That the Proposed Amended Pleading Lacks Merit

Plaintiff has met his burden of demonstrating that "the proffered amendment is not palpably insufficient or clearly devoid of merit." *MBIA Ins. Corp.,* 74 A.D.3d at 500 (1st Dept. 2010); Plaintiff's Brief, pp. 11-15. As the Co-op is unable to point to any substantial insufficiency or lack of merit, Plaintiff's motion for leave to amend should be granted.

1. The Co-op Has Not, and Cannot, Demonstrate that the Proposed Amended Claim for Breach of Contract Claim Lacks Merit

In a failed effort to argue that the pleading lacks merit, the Co-op seems to claim that Plaintiff is himself in breach of a contract, thereby precluding Plaintiff from alleging a *prima facie* claim for breach of contract.[2] Co-op Brief, pp. 7-8, 13. However, even read in the light most favorable to the Co-op, this claim would constitute, at best, a possible ground for a subsequent motion for summary judgment given the fact-intensive nature of the Co-op's contention. This is certainly not a proper ground for denial of a motion for leave to amend. *Pier 59 Studios, L.P. v. Chelsea Piers, L.P.*, 40 A.D.3d 363, 366 (1st Dep't 2007) (*quoting Hospital*

[2] Plaintiff is in full compliance with all terms of the Proprietary Lease and the Roof Rules. Musey Affidavit, ¶ 3. Moreover, Plaintiff was not provided proper notice of this alleged breach, as this is the first time the Co-op has ever notified Plaintiff of any possible breach/default on his part. *Id.*

for Joint Diseases Orthopaedic Inst. v Katsikis Envtl. Contrs., 173 A.D.2d 210 (1991) (citations omitted)).

In order to make this meritless argument, the Co-op contorts and intentionally misconstrues the Court's Order by stating that the Court has found that Plaintiff "defied" the Co-op's Roof Rules. Co-op Brief at 12 ("[Plaintiff's allegation that he has performed all of his obligations under the Proprietary Lease] is directly contrary to this Court's prior finding that Plaintiff has "so far" "defied" the Co-op's roof rules ... Therefore, it is the law of this case that Plaintiff has failed to perform his obligations under the [Proprietary Lease]"). In context, however, it is clear that the Court was simply summarizing the Co-op's prior arguments to that effect. *See* Court Order, p. 10 ("The Cooperative argues that plaintiff's use of the terrace, to any degree, depends on adherence to the Terrace/Roof Rules, which he has defied, so far"). The Co-op's claim that this recitation of facts is somehow "law of the case" fails by a wide margin. It is well settled that a court's recitation of a party's argument does not amount to a binding, prior ruling. *Sudarsky v. City of New York,* 247 A.D.2d 206, 206 (1st Dep't 1998) (court declined to give its own prior decision law of the case effect as to "anything other than legal determinations that were necessarily resolved on the merits in the prior decision") (citations omitted); *Atlantic Aviation Invs. LLC v. MatlinPatterson Global Advisers LLC*, 117 A.D.3d 415, 416 (1st Dep't 2014) (court's statement in the background section of a prior order "as to the amount of consideration was dictum and not the law of the case").

In fact, the disingenuous nature of the Co-op's argument is highlighted by its latest contention, that it never contested exclusive use, when the Order clearly states that the issue of exclusivity of use of the terrace is unsettled, based on the parties' arguments presented. *Id.* It is

evident that the Co-op has elected to play fast and loose with the facts in order to bolster its opposition to Plaintiff's motion.[3]

2. The Co-op Has Not, and Cannot, Demonstrate that the Proposed Amended Claims for Declaratory Relief and Injunctive Relief Lack Merit

a. Law of the Case Does Not Preclude Plaintiff's Claims for Declaratory and Injunctive Relief.

While it is somewhat difficult to parse the Co-op's arguments, it appears that the Co-op is arguing that Plaintiff's proposed cause of action for declaratory relief is barred by the doctrine of law of the case. Co-op Brief pp. 11-12. In effect, the Co-op argues that because this Court dismissed a claim for declaratory relief, Plaintiff is forever barred from asserting any claim for declaratory relief in this case. This argument lacks any semblance of logic or legal basis.

Plaintiff's previous cause of action for declaratory relief sought a declaration that: (i) Paragraphs 4 and 5 of the Roof Rules violate the terms of the Proprietary Lease and are null and void; (ii) the Co-op take all action required to make the terrace habitable, including, but not limited to, installation of flooring surface over the roof membrane; (iii) the Co-op take all action required to make the roof habitable; and (iv) the Co-op replace the exterior doors to the Unit. The Court dismissed this cause of action as an improper challenge to the Roof Rules. Court Order, p. 9.

Conversely, Plaintiff's proposed cause of action for declaratory relief seeks a declaration that: (i) pursuant to the Proprietary Lease, the terrace appurtenant to the Unit is for Plaintiff's exclusive use; (ii) as such, the Co-op is obligated, pursuant to the Proprietary Lease, to effect

[3] Likewise, the Co-op's additional arguments regarding exclusive use and habitability – first that Plaintiff is responsible for habitability and second, that the Co-op cannot be found liable to Plaintiff for failing to provide a terrace for his "exclusive use" because they have not seized the terrace or otherwise evicted him from the space is an absurd argument. However, setting aside the absurdity, it is not a basis to deny the motion for leave to amend. *Pier 59 Studios, L.P.*, 40 A.D.3d at 366 (1st Dep't 2007).

repairs to render the terrace usable for its intended purpose; and (iii) Defendant is obligated, pursuant to the Proprietary Lease, to maintain the three exterior doors to the Unit that existed when Plaintiff purchased the shares referable to the Unit. Plaintiff's proposed cause of action for declaratory relief does not challenge the Roof Rules and simply seeks to enforce rights he has pursuant to the Proprietary Lease, as articulated in *Shapiro*. Therefore, this is a wholly separate and unique cause of action and is not an attempt to challenge the Roof Rules, which claim Plaintiff concedes has been dismissed. Moreover, this Court did not dismiss Plaintiff's previous cause of action for breach of contract. In all events, as the claims for declaratory and injunctive relief are tied to the breach of contract claim, there is no basis to argue that the proposed claims would be precluded by the Order.

b. Plaintiff's Claims for Equitable Relief are not Barred by a Remedy at Law

Struggling to find a way to preclude Plaintiff's amended claims, the Co-op asserts that Plaintiff has an adequate remedy at law and therefore cannot assert claims for declaratory or injunctive relief. Co-op Brief, pp. 14-15. The Co-op is flatly wrong as a matter of law: a declaratory judgment action may be "an appropriate vehicle for settling justiciable disputes as to contract rights and obligations," *Kalisch-Jarcho, Inc. v. New York,* 72 N.Y.2d 727, 731-732 (1988) *(citing Matter of Public Serv. Commn. v Norton*, 304 N.Y. 522, 529 (1952); *see also*, Restatement [Second] of Contracts § 345, comment d, at 107-108; 5 Corbin, Contracts § 991, at 4-5; 4 Williston, Contracts § 601, at 316-317 (3d ed)). The same is true for a claim for injunctive relief. *Oracle Real Estate Holdings I LLC v. Adrian Holdings Co. I, LLC,* 582 F. Supp. 2d 616, 625 (SDNY, 2008) (where a contract right has intrinsic value that cannot easily be quantified, it provides a valid basis for injunctive relief). There is a clear, justiciable controversy regarding the rights and obligations of the parties *vis-à-vis* Plaintiff's right to exclusive use of a terrace in

usable form as opposed to, at most, a non-trafficable, delicate surface, as it currently stands. As such, Plaintiff's proposed cause of action for declaratory relief is the perfect form to settle this dispute.

3. The Co-op Has Not, and Cannot, Demonstrate that the Proposed Amended Claim for the Implied Warranty of Habitability Lacks Merit

As the Court of Appeals has recognized, "[i]t is a patent impossibility to attempt to document every instance in which the warranty of habitability could be breached ... [e]ach case must, of course, turn on its own peculiar facts." *Park West Mgmt Corp. v. Mitchell,* 47 N.Y.2d 316, 327 (1979). Indeed, the Co-op's assertion that it is only responsible for the roof membrane does not bar Plaintiff's claim for breach of the warranty of habitability, but rather, creates an additional fact question, which cannot be resolved at this juncture. Co-op Brief, p. 17. Moreover, the Co-op's reference to an unpublished, Supreme Court opinion (*Jackson v. Westminster House Owners Inc.*) to bolster its argument is not binding on this Court and likewise does not bar Plaintiff's right to seek leave to amend his pleading.

POINT II

PLAINTIFF HAS DEMONSTRATED HIS ENTITLEMENT TO SEEK LEAVE TO REARGUE

Plaintiff has demonstrated his entitlement to seek leave to reargue that portion of the Order which dismissed his request for a declaration enforcing the Proprietary Lease to require the Co-op to make the terrace habitable. Plaintiff's Brief, pp. 16-17. In opposition, the Co-op's sole argument seems to be that the decision rendered in *Shapiro v. 350 E. 78th Street Tenants Corp.*, 85 A.D.3d 601 (1st Dep't 2011) is inapplicable and distinguishable from the case at hand. Here, the Co-op is incorrect. The decision rendered in *Shapiro* is wholly apposite to the case at bar.

In *Shapiro,* the court found that the language in the proprietary lease which referenced the plaintiff's right to exclusive use of her terrace also mandated that the co-op at 350 East 78th Street return her terrace to a form in which she could use it. *Id.* at 601 ("the Lessee shall have and enjoy the exclusive use of the . . . roof and/or that portion of the roof appurtenant to the penthouse, subject to the applicable provisions of this lease . . ."). As explained in Plaintiff's Brief at pp.16-17, the Proprietary Lease between the parties herein contains language identical to that in *Shapiro.* First Amended Complaint, Exhibit A. Contrary to the Co-op's argument, Plaintiff is not seeking a declaration that the Co-op has to install whatever he wishes. All the Co-op must do is make the terrace usable for normal expected use.[4] Habitability attaches once the terrace is usable.

Try as it might, the Co-op cannot avoid the conclusion that *Shapiro* requires that the Co-op make the terrace surface usable so that Plaintiff may use the terrace as it was intended to be used in the Proprietary Lease. Plaintiff's motion for reargument should be granted for this reason.

POINT III

THE CO-OP FAILS TO MEET THE STANDARD TO SEEK LEAVE TO REARGUE THE COURT'S ORDER REGARDING THE FOURTH CAUSE OF ACTION

In support of its motion seeking leave to reargue the Court's denial of its motion to dismiss Plaintiff's fourth cause of action, the Co-op argues that the Court should have granted it summary judgment, dismissing the fourth cause of action for breach of contract, as the Co-op believes Plaintiff has breached the Roof Rules and thus cannot demonstrate entitlement to relief for breach of contract himself.[5] Co-op's Brief in Support of Cross-Motion, pp. 6-8.

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[4] The Co-op's obligation to provide Plaintiff a usable terrace in the first instance is different from Plaintiff's obligation to protect the terrace from his use.

[5] Relatedly, the Co-op did not initially move for summary judgment. As such, it cannot be granted leave to

However, this is the first time the Co-op has made this argument and as such, it cannot be considered on a motion to reargue. *DeSoignies v. Cornasesk House Tenants' Corp.*, 21 A.D.3d 715, 718 (1st Dep't 2005) ("reargument is not available where the movant seeks only to argue a new theory of law not previously advanced") (quoting *Frisenda v. X Large Enters.*, 280 A.D.2d 514, 515 (2d Dep't 2001)). Even if this argument was properly made, Plaintiff is in full compliance with all terms of the Proprietary Lease, and the Roof Rules. Musey Affidavit, ¶ 3. Moreover, Plaintiff was not provided proper notice of this alleged breach as required by Paragraph 19 of the Proprietary Lease, as this is the first time the Co-op has ever notified Plaintiff of any possible breach/default on his part. *Id.*

Further, as is noted in the Court Order, the issues surrounding the fourth cause of action are unsettled. Court Order, p. 10. Inasmuch as the parties have yet to conduct discovery, these issues remain unsettled. Krieg Aff., ¶ 4. Therefore, the Co-op cannot meet the standard to seek leave to reargue that portion of the Court's Order.

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reargue a motion for summary judgment.

CONCLUSION

Based upon the foregoing, Plaintiff respectfully requests an order granting his application for leave to amend the complaint and for leave to reargue that portion of the Order which denied his motion for summary judgment on the third cause of action seeking a declaration that Defendant Co-op is required make the terrace habitable. Additionally, Plaintiff respectfully requests that Defendant's application for leave to reargue be denied in all respects.

Dated: New York, New York
October 1, 2015

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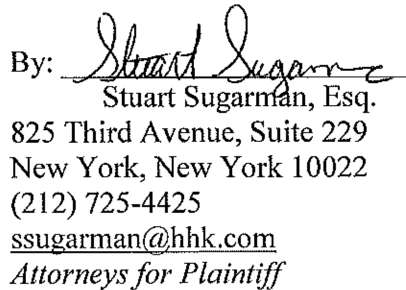

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