

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

Index No: 15731/2014

-----X
J. ARMAND MUSEY,

Plaintiff

-against-

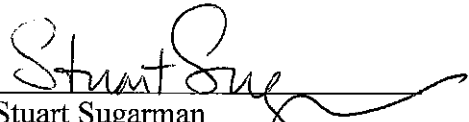
425 EAST 86 APARTMENTS CORP., DOUGLAS:
ELLIMAN PROPERTY MANAGEMENT,
FRANK CHANEY, PATRICIA CARBON,
DAVID MUNVES, MICHAEL CONSIDINE,
SUZANNE KEAN, JENNIFER KRUEGER,
GEORGE GREENBERG, ALEXANDER
SHAPIRO and LESLIE SPITALNICK,

Defendants.

NOTICE OF CROSS-MOTION

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PLEASE TAKE NOTICE that, upon the annexed affidavit of J. Armand Musey sworn to on January 13, 2015, the annexed affidavit of Margaret Janicek sworn to on January 13, 2015, the exhibits set forth therein, the affirmation of Charles D. Krieg dated January 13, 2015, the memorandum of law dated January 13, 2015, and all prior proceedings had herein, plaintiff will cross-move this Court at Room 130 thereof, at the Courthouse, 60 Centre Street, New York, New York, on the 26th day of February, 2015 at 9:30 a.m. or as soon thereafter as counsel may be heard for an order: (i) pursuant to CPLR § 3212 granting plaintiff's motion for summary on the third and fourth causes of action set forth in the complaint; (ii) dismissing defendants' affirmative defenses; (iii) for an award of attorneys' fees and costs and (iv) for such other and further relief this Court deems just and proper.

Dated: New York, New York
January 13, 2015



Stuart Sugarman
HINMAN, HOWARD & KATTELL, LLP
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New York, New York 10004
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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 Plaintiff :
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 -against- :
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 425 EAST 86 APARTMENTS CORP., DOUGLAS :
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 Defendants. :
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Index No: 15731/2014

**AFFIDAVIT OF J. ARMAND
MUSEY IN OPPOSITION TO
DEFENDANTS' MOTION TO
AND IN SUPPORT OF MOTION
OF PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

I, J. Armand Musey, being duly sworn deposes and says as follows:

1. I am the plaintiff in the herein proceeding and have personal knowledge of the facts set forth herein and submit this affidavit in opposition to defendants' motion to dismiss and in support of my motion for summary judgment.
2. On December 13, 2012, I entered into a contract of sale to purchase the shares of stock of 425 East Apartments Corp. ("425 East") representing the exclusive ownership interest in apartment PHA at 425 East 86th Street, New York, New York ("Apartment") from the estate of Elaine Kaufman, the noted restaurateur. At the time, the building was undergoing a multi-year façade, roof and terrace repair process. This repair process prevented me from inspecting the roof ("Roof") and terrace ("Terrace") areas deemed to be part of the apartment as set forth in the first page of the Proprietary Lease before purchasing shares representing my ownership interest in the Apartment. In fact, the draftsman I hired to measure the apartment before my purchase was unable to measure

the exterior areas of the Apartment. This is because he deemed it unsafe to enter those areas even to simply measure their length and width. It was not feasible to move the extensive construction equipment, rigging, tons of counterweights for the rigging, and scaffolding on the terrace so that the wood covering the terrace could be removed to allow the terrace surface membrane to be inspected (see Exhibit 1 attached hereto - photos of terrace condition at time of purchase). Moreover, any inspection would have only shown an area with construction in progress, not the final post-construction version, without a protective finish layer. It remains, in my view, incomplete for normal use.

3. Annexed hereto as Exhibit 2 is a copy of the floor plan for the Apartment, which clearly depicts the extensive wraparound terrace and location of the building's only access to the roof above, a ladder on the back portion of the wraparound terrace. The existing extendable awning and exterior lights, both operable only from standing on the terrace itself, and the well-worn steps from the apartment onto the terrace strongly suggest the prior owner regularly used these areas. Additionally the prior owner suggests in a 1988 article in *Architectural Digest* that the Apartment's outdoor areas were a significant reason for her purchase (a copy of attached hereto as Exhibit 3). The terrace and roof are shared with the owner of the only other penthouse owner, long-time board member George Greenberg ("Greenberg"). Greenberg's terrace is well appointed (see Exhibit 4 photo attached hereto) and his air conditioning compressor is installed on the roof above his apartment. Access to the roof level is only possible via the ladder on the rear portion of the Apartment's wraparound terrace. No other shareholders have any personal property on the roof or terrace.

4. On January 24, 2013, my partner, Margaret Janicek (“Janicek”) and I, attended an interview (“Interview”) conducted by the members of the board of 245 East (“Board Members”). During the Interview, Janicek and I were told, among other things, by the Board Members that: (i) a lot of work was being done on the Terrace; (ii) I would have a lovely new terrace and (iii) I would be the only one to enjoy the Terrace. Paragraph 6 in each of the Considine, Kreuger and Munves Affidavits is technically correct that neither Janicek nor I inquired about the terrace or roof area outside of our Apartment. We did not inquire because the above information was volunteered to us without us asking! Given their professional and social statures, we (mistakenly) assumed them to be honest and forthcoming.
5. The Board Members failed to inform Janicek and me, at the Interview, or at any other time before the purchase, that the Board contracted for the Terrace surface to be repaired with only a delicate membrane, lacking a protective finishing surface, that, when completed, would not even withstand foot traffic without additional unspecified costly alterations.
6. An inspection report prepared by Serge Klein, a registered architect (“Architect Report”) in conjunction with the Co-Op conversion indicates that the prior Terrace surface was regularly used and capable of supporting planters (and presumably the wear of people walking to tend to the planters) (a copy of the Architect Report is annexed hereto as Exhibit 5). The Architect Report also indicated the Terrace surface was originally promenade tile (“promenade,” being the French work for a recreational walk) clearly capable of supporting ordinary usage.

7. Prior to execution of the purchase agreement on February 27, 2013, we examined the house rules that included the roof and terrace rules that had been unchanged since the Co-Op conversion in 1987. However, the Board Members failed to disclose that house rules for the roof and terraces of the two families living in penthouse apartments of 425 East were being rewritten (“Roof/Terrace Rules”) to: (i) require the penthouse apartment owners to alter the terrace, at their own expense, so that it would withstand foot traffic; (ii) require the penthouse apartment owners to enter into an undisclosed indemnification agreement, acceptable to the building, that would force them to indemnify 425 East for any indirect damage that might be caused by the required alterations or subsequent use of the roof or terraces (by anyone presumably including building maintenance/repair personnel); (iii) shift the responsibility of maintaining the roof and terraces from 425 East to the penthouse apartment owners; (iv) prohibit erecting any enclosures on the roof or terraces; and (v) impose vast restrictions on the use of the terraces. In particular, I was not shown the rules dated February 25, 2013 (Defendant’s Exhibit N). If the February 25, 2013 rules had been disclosed, I would not have bought the Apartment two days later.
8. At no time was I given any information nor did I sign any agreements specifying that any items in the Apartment were not original or that the Building was excluding any elements of the Apartment (interior or exterior) from the Building’s maintenance responsibilities described in the Lease.
9. As a result of the Board’s failure to disclose the information above before purchasing, I had no reason to believe the newly repaired Terrace would be in an unusable condition, not even suitable for maintenance purposes, after the ongoing repairs were completed. Nor did I have any reason to believe that I would be subjected to significant financial

requirements for repair, maintenance and liability of the Terrace and Roof that were not contained in the Proprietary Lease and that these requirements would apply whether or not I ever used the Terrace. I reasonably relied on the information in the offering documents provided by Douglas Elliman Property Management (“DEPM”). The offering documents included a copy of a generic unexecuted proprietary lease, the building’s By-Laws, existing House Rules (including Roof/Terrace Rules) previous building inspection reports including the Architect Report and other information that I evaluated when deciding to purchase shares in 425 East. I also reasonably relied upon the fact that neither the Board nor DEPM provided any additional disclosure that would suggest these documents were unreliable or that they did not intend to abide by their terms.

10. On February 27, 2013, I purchased the shares of 425 East, representing the ownership of the Apartment. The building received a flip tax of 2% of the sale price, a portion of which benefited the Board Members as shareholders of 425 East. DEPM also received fees related to the sales transaction process. The purchase price was the second highest in the history of the building and approximately twice the average sales price in the building over the past few years, despite the fact the Apartment was in a state of disrepair. I agreed to such a high purchase price because of the extensive terrace and roof areas explicitly included as part of the Apartment. My purchase price was consistent with the range of other bids for the apartment, including a slightly higher bid that the Board turned down based on their assessment of that bidder’s financial condition.

11. The first page of the Proprietary Lease (a copy of which is annexed hereto as Exhibit 6) provides that the Terrace and Roof “appurtenant” (connected) to the Apartment are deemed to be part of the Apartment for the exclusive use of the Apartment owner. The

Proprietary Lease also provides that 425 East has the obligation to maintain and repair the Roof and Terrace. More specifically, Paragraph 2 of the Proprietary Lease requires 425 East to maintain the building in good repair “except those portions the maintenance and repair of which are expressly stated to be the responsibility of the lessee pursuant to Paragraph 18 hereof”. Paragraph 18 of the Proprietary Lease, in listing the obligations of the Lessee, makes no reference to the Roof or Terrace and specifically provides that the Lessee is not responsible for maintaining the exterior doors or windows. As a result, the obligation to maintain the Roof, Terrace, exterior doors and windows rests with 425 East. Paragraph 3 of the Proprietary Lease sets the standard for such maintenance. It requires the Lessor to maintain and manage the building “as a first-rate apartment building.”

12. The Proprietary Lease provides that the cash requirements payable by any lessee may not be increased. Paragraph 6 of the Proprietary Lease prevents 425 East from increasing my proportionate share of cash requirement:

6. Each proprietary lease shall be in the form of this lease, unless a variation of any lease is authorized by lessees owning at least two-thirds of the Lessor’s shares then issued and executed by the Lessor and lessee affected. The form and provisions of all the proprietary leases then in effect and thereafter to be executed may be changed by the approval of the lessees owning at least 75% of the Lessor’s shares then issued, and such changes shall be binding on all lessees even if they did not vote for such changes **except that the proportionate share of rent or cash requirements payable by any lessee may not be increased** nor may his right to cancel the lease under the conditions set forth in Paragraph 35 be eliminated or impaired, without his express consent. Approval by lessees as provided for herein shall be evidenced by written consent or by affirmative vote taken at a meeting called for such purpose. [emphasis added].

13. In April 2013, the Board approved alteration plans for the Apartment (not including common areas or any other areas not part of the Apartment) that, among other things, permitted me to install two additional doors to access the Terrace and Roof areas (in

addition to the three existing well-worn doors that open directly onto the terrace) and install an air-conditioning compressor on the Roof – the latter necessitated invasive alterations to the roof to secure the compressor housing to the substructure of the roof, channeling a hole through the roof to run the power and coolant lines, and repairing the affected areas. Thereafter, in June 2013, defendant Frank Chaney (“Chaney”) informed me that the Board Members were making new Roof/Terrace rules just for the terraces of the two penthouse apartments in response to my alteration proposal. Once the new Roof/Terrace Rules were in place, the Board would consider my original alteration plans for the Terrace (since withdrawn). Chaney further stated that the prior Roof and Terrace rules had been unchanged since the 425 East’s 1987 Co-Op conversion.

14. On July 27, 2013, the very day the construction crew cleared the Terrace, and approximately one month after I moved into the Apartment, DEPM contacted Janicek and informed her that the Board Members unanimously adopted the Roof/Terrace Rules (a copy of later e-mail correspondence supporting this is annexed hereto as Exhibit 7) which require me to: (i) enter into a building alteration agreement to install, at my expense, an unspecified protective covering over the newly installed terrace membrane and related engineering analysis; (ii) execute an indemnification agreement whereby I would agree to indemnify 425 East for any direct or indirect damage sustained to the terrace membrane and other building areas; (iii) prohibit me from accessing the terrace until the foregoing requirements were completed to the Board’s satisfaction; and (iv) subject me to vast restrictions on the use of the terrace. At the request of the board, the new Roof/Terrace rules were only distributed to the residents of the two penthouse apartments.

15. After I objected to the terms of the new Roof/Terrace Rules, the Board Members represented to my attorneys and me on numerous occasions that the Roof/Terrace Rules were not final and were subject to modifications to address my concerns.
16. On August 26, 2013 Kaswaree Narine, the DEPM assistant property manager for the Building (“Narine”) sent me an e-mail indicating that the roof standards were being finalized and that DEPM would forward them to me that week. Narine’s e-mail also indicated that the building engineer, Sean Daley (“Daley”) was working on his final report for the terrace scope and that DEPM has asked him to expedite that work – presumably it would indicate the exact scope of construction alterations the Board would require me to preform. (a copy of the correspondence is annexed hereto as Exhibit 8). Despite numerous requests, I have never received either of these documents.
17. On August 18th 2013 board treasurer David Munves (“Munves”) visited our apartment to discuss the roof/terrace situation. Among other things, it was clear he had never even seen the terrace before as he mentioned, “I had no idea it was this narrow.” The next day, on August 1, 2013 he sent an e-mail to DEPM outlining a few maintenance issues regarding the terrace area. The largest of these issues, the pooling or water due to incorrect leveling of the terrace away from the drains, and the gap around the electrical conduit remain unrepaired to date (a copy of the email correspondence is annexed hereto as Exhibit 20).
18. September 11, 2013, board treasurer David Munves indicated that the board was open to discussing potential clarifications or modifications to the new Roof/Terrace rules to address our concerns (a copy of the email correspondence is annexed hereto as Exhibit 19).

19. On September 19, 2013, Chaney indicated that the Board endorsed the proposal to meet with me and consider my specific objections to the Roof/Terrace Rules and potentially make modifications. His e-mail also confirmed my exclusive use of the roof , “As I’m sure you know and understand, while you have exclusive use of the roof adjacent to your penthouse, you don’t own it;” (a copy of the email correspondence is annexed hereto as Exhibit 9).
20. In the late Summer/Early Fall of 2013, Board member Greenberg told me during a telephone conversation that assistant property manager, Narine sent an e-mail to the board indicating that if I did not cover the terrace, the building might need to do it themselves so that it could withstand maintenance use. During a separate conversation around this period, Greenberg's wife Robyn indicated that the issue of exclusive use of the terrace was settled years ago and it was shortly after this that he installed gates at the edge of the terrace.
21. On November 26, 2013, the Board offered to meet with me to discuss the Roof and Terrace issues to understand the obligations which I believed were being imposed on me (a copy of the correspondence is annexed hereto as Exhibit 10).
22. On December 16, 2013, DEPM sent me an e-mail indicating that it would give me the same notice [when accessing the roof and terrace] as provided other shareholders when access to their apartments is required for maintenance work (a copy of the email is annexed hereto as Exhibit 11).
23. On January 10, 2014, Chaney requested that I refrain from involving my attorneys so that the Board could discuss the situation with me directly. Chaney also indicated that if our discussions failed, he would instruct the building’s attorney to speak with my counsel

about modifying the new Roof/Terrace Rules (a copy of the email correspondence from Chaney is annexed hereto as Exhibit 12).

24. On February 2, 2014, Chaney and defendant David Munves finally met with Janicek and me. During the meeting, I indicated that we felt that we had been misled by the sudden and significant change in Roof/Terrace rules just after we moved in. Chaney and Munves then explained that the board had been working on the Roof/Terrace rules for “a long time” and “many months” before we bought. This seemed to confirm our concerns that the Board withheld information during our purchase rather than allay them. Thereafter, on February 26, 2014, Chaney sent me an e-mail indicating, repeatedly using the future tense, that the Board would make some changes to the Roof/Terrace Rules (a copy of the email correspondence is annexed hereto as Exhibit 13). We have not yet been notified that the board has made those changes or the exact form of those changes.
25. Obviously recognizing my exclusive right to access the Roof and Terrace, on or about February 2014, 425 East installed alarms on the stairwell doors accessing the Roof after I expressed my concerns about the Roof being accessed by others without my permission.
26. On March 5, 2014, in an email, Chaney again acknowledged that I had the exclusive use of the Roof and Terrace, wherein he stated that “the considerations/obligations with respect to your exclusive use of the portion of the roof adjacent to your apartment are as stated in the Lease and the Roof Terrace Standards.” (a copy of the correspondence is annexed hereto as Exhibit 14). This e-mail also makes it clear that the surface is not currently suitable for even standing or foot traffic. On another e-mail this same day, Chaney again reiterated that the Board was open to working cooperatively about changing the Roof/Terrace rules and asks for a proposal from me. He also added that my

attorney was free to have discussions with the Building's counsel about legal issues (a copy of the correspondence is annexed hereto as Exhibit 18).

27. On April 1, 2014, 425 East's attorney, Herbert Cohen, Esq. ("Cohen") wrote a letter to my attorney outlining 425 East's position, including that I undisputedly have exclusive use of the terrace and the it was indisputable that it was part of my apartment. Cohen also indicated a willingness to make additional changes to the Roof/Terrace Rules, a position presumably shared by the board. His letter also revealed several severe misconceptions about my position. Frankly, this gave me hope of a resolution, because it indicated that the issues in dispute might be due, in large part, to communication problems as opposed to intractable differences (a copy of the correspondence is annexed hereto as Exhibit 15).
28. On April 14, 2014 both building engineer Daley and DEPM property manager Karel DeBoer repeatedly and emphatically indicated, in front of several witnesses, that the two terrace doors in the living room should be replaced in addition to the terrace door in the back room off the kitchen. While 425 East has agreed to replace the terrace door off the back room, it has refused to replace the two off the living room. The two terrace doors off the living room are worn and condensation collects between the double-paned door, indicating the seal has broken, greatly reducing its insulation properties. I am not able to keep the living room at legal minimum temperatures with 425 East's heating system. Temperatures in the back room and living room frequently fall below 50-degrees Fahrenheit, well below the 60-degree legal nighttime minimum or 68 degree daytime minimum requirement. The other rooms in the apartment and the rest of the building do not have any issues with low heat that we are aware of. Moreover, one of the living room doors is bent and does not lock, creating a security concern. The security concern is

particularly problematic given the fact that building maintenance personnel access the terrace and that it can also be accessed from the building's fire escape ladder that reaches the terrace level (but not the roof level).

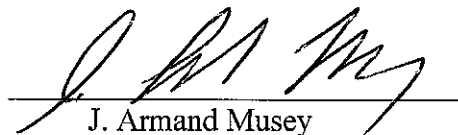
29. In late April, after my attorneys' cleared-up the misconceptions Cohen had about my position (described in paragraph 24 supra), Cohen and my attorneys discussed a compromise to the new Roof/Terrace rules to address my concerns. Cohen noted to my attorneys that he would suggest the compromise to the board. While these did not perfectly meet my needs, I accepted based on a desire to end the matter and preserve goodwill among my neighbors. A few days later, Cohen indicated to my attorney that the Board had formally considered the compromise and rejected it.
30. Cohen actively encouraged further discussions to avoid litigation, but those discussions and correspondence did not produce any further compromise or agreement to change.
31. On July 14, 2014, my attorneys received a correspondence from Cohen, which stated that the Board was no longer willing to meet with me to discuss modifying the Roof/Terrace Rules (a copy of the notice is annexed hereto as Exhibit 16).
32. At this point I believed I had exhausted all reasonable alternatives, and believed the Board had ultimately taken a final position on the new Roof/Terrace Rules (in violation of the proprietary lease), albeit without finalizing them or ever making a determination of what my exact obligations under them would be. Reluctantly, I filed the Complaint against the Board and 425 East shortly thereafter on July 25, 2014. Prior to this, neither I nor my partner Margaret Janicek, had ever sued anyone in our lives. That the litigation is against our neighbors and the building we see as our dream home, is particularly disappointing.

33. To date, neither I, nor any of the other shareholders, received notice that the Roof/Terrace Rules had been finalized. The rules themselves indicate they are subject to change at any time.
34. Board member Greenberg's terrace is in violation almost every element of the Roof/Terrace rules. In 1990, using an alteration agreement for his Apartment, Greenberg covered his section of the terrace surface with rubber tiles, which by both his admission and the board's admission do not meet the standards of the new Roof/Terrace rules. I understand he used this same alteration agreement for the installation of his air compressor and related components on the roof above his apartment done at about the same time. However, Greenberg has indicated to me, and the Board had confirmed in Defendant's Exhibits L and O, that he will not be required to replace his terrace covering until the building replaces the terrace surface on his side of the building, potentially decades from now. Additionally, he has trellises attached to the parapets, many of his plants are several feet above the proscribed maximum six-foot height, and he has large fixed awnings on both ends of his terrace as well as a pergola in the middle (see Exhibit 4 attached hereto) –these are in violation of precisely the elements of new Roof/Terrace Rules that might have safety impacts related to high wind events – the Board's purported reason for creating the new Roof/Terrace rules in the first place. Greenberg does not appear to have taken any steps to bring his terrace into compliance with the Roof/Terrace rules passed nearly 18 months and two hurricane seasons ago. In fact, since then workers have reinforce his fixed awnings, something that would not be possible without the building staff and DEPM's knowledge. Greenberg has told me on several occasions after

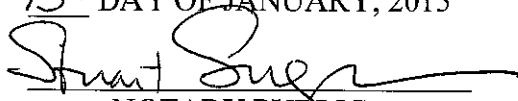
I bought the apartment that I should not assume that I would be able to do with my terrace what he has done with his.

35. Several of the parapets on the terrace level have been repaired during the recent multi-year construction project and all appear to be at or above 42 inches in height. The parapets on the roof level (above the apartment), however, are only 12 to 15 inches high (See Exhibit 17 attached hereto), well below the 42-inch requirement. Daley (Daley Affidavit) and Narine (Narine Affidavit) seem to have confused the roof and the terrace. They refer only to the "terrace" level when they said the parapets on the "roof and terrace" meet the 42-inch legal minimum height. All of the pictures in the Defendant's Exhibit K are of the terrace level parapets and none are from the roof level, the only area where the parapet height is at issue. Likewise, Narine incorrectly indicated it is possible to access the roof from the building's internal stairwell (via doors that are fire alarmed to preserve our exclusive access). Only terrace level access is possible from those doors. The roof level is only accessible via a ladder on the rear portion of the wrap around terrace connected to the outer wall of the Apartment. (See Exhibit 2 floor plan attached hereto).
36. Water has been pooling in the northeast corner of the terrace on my side of the building. This is because the new roof surface is leveled such that water flows away from the drains as opposed to towards them. The Board has known about this issue since August 2013 (see Exhibit 20 attached hereto). I understand at least one apartment is experiencing leaks below this area. With the exception of reinstalling a safety bar on the parapets, none of the items listed by board treasurer have been completed to date.

WHEREFORE, I respectfully request that this Court issue an order directing that: (i) defendants' motion to dismiss the complaint be denied in its entirety; (ii) granting plaintiff's motion for summary on the third and fourth causes of action set forth in the complaint; (iii) for an award of attorneys' fees and costs and (iv) for such other and further relief this Court deems just and proper.


J. Armand Musey

SWORN TO BEFORE ME THIS
13th DAY OF JANUARY, 2015


NOTARY PUBLIC

STUART SUGARMAN
Notary Public, State of New York
No. 4673448
Qualified in Nassau County
Commission Expires April 30, 2018

SUPREME COURT OF THE STATE OF NEW YORK
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**AFFIDAVIT OF MARGARET
JANICEK IN OPPOSITION TO
DEFENDANTS’ MOTION TO
AND IN SUPPORT OF MOTION
OF PLAINTIFF’S MOTION FOR
SUMMARY JUDGMENT**

I, Margaret Janicek, being duly sworn deposes and says as follows:

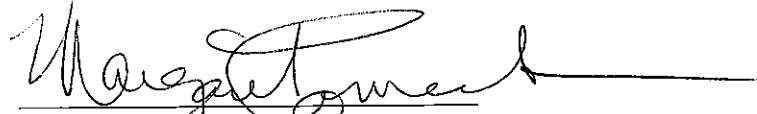
1. I am a witness in the herein proceeding and have personal knowledge of the facts set forth herein and submit this affidavit in opposition to defendants’ motion to dismiss and in support of the plaintiff’s motion for summary judgment.
2. On January 24, 2013, my partner, Armand Musey (“Musey”) and I, attended an interview conducted by the members of the board of 245 East 86 Apartments Corp. During the interview, the board members present told Armand and I that, among other things, (i) a lot of work was being done on the Terrace; (ii) we would have a lovely new terrace and (iii) we would be the only ones to enjoy the Terrace.
3. The identical Paragraph 6’s of the Considine, Kreuger and Munves Affidavits are technically correct in that neither Musey nor I inquired about the terrace or roof area outside of our Apartment. We did not inquire because the above information brought up by the Board members themselves as part of the interview. Given their professional and

social statures and the fact that we were to be potential neighbors, we (mistakenly) assumed them to be honest and forthcoming.


4. On February 2, 2014 Musey and I met with Board president Frank Chaney (“Chaney”) and Board Treasurer David Munves (“Munves”) to discuss potential changes to the new Roof and Terrace rules. Musey mentioned that he felt taken advantage of in since the long standing rules were dramatically changed a month after we moved in. In response Chaney and Munves both indicated the changes were not related to our purchase but had been in process for a long time due to a concern about high-wind events, including Hurricane Sandy, between 2010 and 2012.
5. On April 14, 2014 building engineer Sean Daley (“Daley”) and DEPM Building Manager Karel DeBoer (“DeBoer”) visited the apartment to inspect the construction process. During the meeting Daley and DeBoer unmistakably indicated, that in addition to the existing exterior terrace door off the kitchen, the two exterior terrace doors off the living room also needed replacement. Musey asked them if that was their professional opinion and Daley and DeBoer confirmed. Several witnesses were present and Daley and DeBoer stated this opinion clearly and repeatedly.
6. The Roof is only accessible via a ladder on the rear portion of the wraparound terrace.

WHEREFORE, I respectfully request that this Court issue an order: (i) denying defendants’ motion to dismiss the complaint in its entirety; (ii) granting plaintiff’s motion for summary on the third and fourth causes of action set forth in the complaint; (iii) awarding attorneys’ fees and

costs to the plaintiff and (iv) granting such other and further relief this Court deems just and proper.


Margaret Janicek

SWORN TO BEFORE ME THIS
^{13th} DAY OF JANUARY, 2015


NOTARY PUBLIC

STUART SUGARMAN
Notary Public, State of New York
No. 4673448
Qualified in Nassau County
Commission Expires April 30, 2018

SUPREME COURT OF THE STATE OF NEW YORK
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**AFFIRMATION OF CHARLES
KRIEG IN OPPOSITION TO
DEFENDANTS' MOTION TO
DISMISS AND IN SUPPORT OF
OF PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

Charles D. Krieg, Esq., an attorney admitted to practice before the Courts of the State of New York, under penalty of perjury alleges as follows:

- 1) I am a member of Paykin Krieg & Adams LLP and have personal knowledge of the facts set forth herein and submit this affirmation in opposition to the defendants' motion to dismiss and in support of plaintiff's motion for summary judgment.
- 2) On or about July 25, 2014, the plaintiff commenced this action by filing a summons and complaint (a copy of the summons and complaint are annexed as Exhibit A to the affirmation of Tracy Peterson, Esq. submitted in support of the defendants' application to dismiss this action ("Peterson Affirmation").

- 3) On or about September 19, 2014, the defendants (other than Greenberg) served an answer, affirmative defenses and asserted a counter claim (a copy of which is annexed to the Peterson Affirmation as Exhibit B).
- 4) On or about October 6, 2014, the plaintiff served an answer to the counterclaim. Since the defendants failed to include this pleading in support of its motion to dismiss, it is included herewith as Exhibit 1.
- 5) On April 1, 2014, 425 East's attorney, Herbert Cohen, Esq. ("Cohen") wrote a letter to Musey's counsel outlining 425 East's position and indicated a willingness to make additional changes to the Roof/Terrace Rules.
- 6) On April 9, 2014, I and co-counsel Stuart Sugarman, met with Cohen at his offices to discuss the Roof/Terrace Rules. At the meeting Cohen indicated that the Board would consider modifying the Roof/Terrace Rules to address the concerns raised by Musey regarding shifting the financial responsibility of maintaining the Terrace to Musey.
- 7) Thereafter, in late April, 2014, I was informed that the Board considered and rejected Musey's request to modify the Roof/Terrace Rules.
- 8) In early June 2014, shortly after the June board elections, Mr. Sugarman and I discussed with Cohen another compromise to the Terrace/Roof Rules. Cohen advised that he would suggest the compromise for the Board's consideration. I was notified on July 8, 2014 that the Board rejected it and would not consider additional changes.

WHEREFORE, I respectfully request that this Court issue an order: (i) denying defendants' motion to dismiss the complaint in its entirety; (ii) granting plaintiff's motion for summary on the third and fourth causes of action set forth in the complaint; (iii) awarding

attorneys' fees and costs to the plaintiff and (iv) granting such other and further relief this Court deems just and proper.

Dated: New York, New York
January 13, 2015

A handwritten signature in black ink, appearing to read 'CDK', is written over a horizontal line.

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