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

J. ARMAND MUSEY,	:	Index Number: 157316/2014
	:	(Wooten, J.)
Plaintiff,	:	
	:	
-against-	:	
	:	
425 EAST 86 APARTMENTS CORP., DOUGLAS ELLIMAN PROPERTY MANAGEMENT, FRANK CHANEY, PATRICIA CARBON, DAVID MUNVES, MICHAEL CONSIDINE, SUZANNE KEANE, JENNIFER KRUEGER, GEORGE GREENBERG, ALEXANDER SHAPIRO, AND LESLIE SPITALNICK,	:	
	:	
Defendants.	:	

MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Dated: New York, New York
February 25, 2015

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Plaintiff Armand Musey by and through his attorneys respectfully submits this memorandum of law in further support of his motion for summary judgment on his declaratory judgment and breach of contract causes of action.

STATEMENT OF FACTS

Plaintiff's moving papers clearly establish his entitlement to summary judgment on the causes of action set forth in the complaint for a declaration that: (i) the roof and terrace are part of the Apartment and therefore, 425 East Apartments Corp. ("425 East") must provide him with a habitable roof and terrace and (ii) 425 East cannot force him to perform building construction alterations at his own expense and/or assume indemnification obligations outside of those contained in proprietary lease for his unit ("Proprietary Lease"). In addition, since Musey has established that 425 East is in breach of the Proprietary Lease, he is entitled to summary judgment on his breach of contract cause of action. In opposition to the herein application, the defendants have woefully failed to establish a viable defense. More specifically, the defendants argue that: (i) they are not obligated to provide Musey with a habitable terrace because the prior owner never used the terrace; (ii) paragraphs 4 and 5 of the new roof/terrace rules ("Roof/Terrace Rules") did not shift the financial obligation to maintain the roof and terrace area from 425 East to Musey because 425 East was never responsible for maintaining the terrace; (iii) 425 East does not have to provide Musey with a habitable roof because: (a) the roof is not fit for habitation because 425 East itself installed a water pump on the roof after Musey purchased the Unit; (b) Musey installed an air conditioning compressor on the roof; and (c) 425 is not required to install a proper protective parapet around the perimeter of the roof; and (iv) in the event Musey prevails on his breach of contract claim he is only entitled to an award of consequential damages in the amount of the difference between rent reserved in the Proprietary Lease and the

fair market value during the period of breach. As set forth in detail below, the defendants have not and cannot show why the plaintiff's motion should not be granted in its entirety.

MUSEY IS ENTITLED TO SUMMARY JUDGMENT ON HIS THIRD AND FOURTH CAUSES OF ACTION FOR DECLARATORY JUDGMENT AND BREACH OF CONTRACT

Once a party has established an entitlement to summary judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issues of fact, which require a trial of the action. *Zuckerman v. City of New York,* 49 N.Y.2d 557, 404 N.E.2d 718, 720 (1980). Clearly Musey has established by clear and convincing evidence that he is entitled to summary judgment on his third and fourth causes of action for declaratory judgment and breach of contract and therefore, the burden lies with the defendant to show why Musey's application should be denied. In opposition to the herein application, the defendants have failed to show why 425 East should not be directed to provide Musey with a habitable terrace and roof. Likewise, the defendants have woefully failed to establish that paragraphs 4 and 5 of the Roof/Terrace Rules should not be declared null and void. Finally, the defendants cannot show why summary judgment should not be granted on Musey's breach of contract claim.

POINT I
425 EAST MUST PROVIDE MUSEY WITH A HABITABLE TERRACE AND ROOF

Since Musey has clearly established in his moving papers that pursuant to the Proprietary Lease, he has exclusive use of the terrace and roof and therefore, 425 East must provide him with a habitable roof and terrace, it is incumbent on the defendants to establish by admissible evidence that it does not have such an obligation. As set forth below, the defendants do not even

come close, but instead offer a myriad of unsupportable excuses as to why they should be permitted to skirt their clear contractual obligations.

A. Musey has exclusive use of the terrace and roof

As set forth in Musey's moving papers, he has indisputably established that the Proprietary Lease grants him exclusive use of the terrace and roof. The first page of the Proprietary Lease provides that the terrace and roof "appurtenant" (connected) to the Apartment are deemed to be part of the Apartment for the exclusive control of Musey. Paragraph 7 specifically allocates those areas to the Apartment. Moreover, the Defendants have recognized Musey's exclusive right to use the terrace multiple times prior to commencement of litigation, both verbally and in writing. The defendants have offered absolutely no evidence to refute the foregoing and therefore, Musey has established by clear and convincing evidence that he has exclusive use of the terrace and roof.

B. 425 East Must Provide Musey with a Habitable Terrace

The defendants argue that 425 East should not be directed to make the terrace habitable because the prior owner did not use the terrace and therefore, they are under no obligation to make the terrace habitable for the plaintiff's use. 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." A review of Paragraph 18, in listing the obligations of the Lessee, makes no reference to the Roof and Terrace. In addition, in its current state the terrace is not capable of supporting even ordinary building maintenance. As set forth below, 425 East must be directed to make the terrace habitable and Musey's application for summary judgment must be granted.

1) The terrace must be made habitable for its intended purpose

As clearly established in Musey's moving papers, he is entitled to summary judgment and a declaration that 425 East must make the terrace habitable. In a desperate attempt to avoid the inevitable, 425 East argues that it does not have to make the terrace habitable because the facts herein are distinguishable from the facts contained in the authority cited by Musey. In Shapiro v. 350 E. 78th Street Tenants Corp., 85 A.D.3d 601, (1st Dept. 2011), the court was confronted with a proprietary lease nearly identical to the Proprietary Lease. (a copy of the Shapiro proprietary lease is annexed as Exhibit 2 to the affirmation of Stuart Sugarman dated February 25, 2015 and submitted in support of the herein motion "Sugarman Affirmation"). The proprietary lease in Shapiro defined "apartment" to include any terrace or roof allocated exclusively to the Lessee and then in that lease's paragraph 7 provided for a penthouse tenant to have exclusive use of the terrace and roof appurtenant to the apartment. The foregoing provisions in the Shapiro lease are identical to the provisions contained in the Proprietary Lease. Furthermore, the proprietary lease in Shapiro has the identical paragraph 2 requiring Lessor to keep in good repair essentially all except for that which is specifically required of Lessee and the identical paragraph 18 in the Shapiro lease then sets forth the items required of Lessee to maintain and repair which is also identical to the Proprietary Lease. With the nearly identical proprietary lease, the Appellate Division held that the plaintiff had exclusive use of the roof and the coop corporation was obligated to provide the plaintiff with a useable terrace.

425 East, clearly realizing that Shapiro unquestionably supports Musey's claim for summary disposition, disingenuously attempts to distinguish such authority. 425 East is asking this Court to support its nonsensical position, that, since the prior owner did not use the terrace, it is under no obligation to make the terrace habitable for Musey. The appellate court in Shapiro

noted, "Although the motion court found the prohibition against any and all use of the roof by plaintiff to constitute a breach of the lease, the injunctive order merely directs defendant to make such repairs as may be necessary to restore plaintiff's use of the roof, consistent only with the rights granted to her as the owner of the shares allocated to the penthouse apartment." The restoration of prior use was obviously not predicated on the court's finding that prior use was relevant. Rather, the court determined that eliminating use of the area, as 425 East has done to Musey, was a violation of the proprietary lease's identical guarantee of the right to exclusive use of the area.

Even if the defendants' argument that since where was no prior use, there is no need to restore use was viable – which it is not - the claim that the former owner did not use the terrace is simply false.

1. The Inspection Report prepared for the building in February 1979 ("Inspection Report") and annexed as Exhibit 2 to the affidavit of defendant Frank Chaney submitted in opposition to this motion, clearly shows that the terrace was habitable and used for various purposes. More specifically, the relevant portions of the Inspection Report states:

> Generally, the present condition of the roofs is satisfactory. An exception if the north-easterly corner of the main (lower) roof, where a raised roof deck has been installed over an area of approximately 500 square feet, using lumber of a discarded and replaced water tank. This decking prevents proper drainage of rain water, and is likely to eventually damage the roof surface. Similarly, there are many heavy flowerpots and flower boxes on the roof adjacent to the wood deck, standing directly on the felt roofing. Again, it would be desirable to minimize the weight and size of these boxes, and it they are large, to raise them off the roof surfaces, so as to permit proper drainage and inspection of the roofing. (see page 4 of Inspection Report).

2. In addition, as set forth in the Sugarman Affirmation, Ms. Diane Becker (co-executor of the estate of the prior owner, Ms. Elaine Kaufman, and the manager of the famous Elaine's Restaurant for many years) sent him an e-mail on February 18, 2015 (see Exhibit 1 annexed to the Sugarman Affirmation). This e-mail indicated that Ms. Kaufman unquestionably enjoyed the full use of the terrace. Ms. Kaufman had a deck, plants, furniture, and Ms. Kaufman even engaged the services of a landscaping company, Michael Cherhan Landscapes, Inc., to work on the terrace. Sugarman called the Michael Cherhan Landscapes, Inc, and confirmed that they had in fact provided landscaping for the outdoor areas of Ms. Kaufmans' apartment (now Musey's apartment) (see paragraphs 2-5 of the Sugarman Affirmation).[1]
3. Additionally, Chaney and DEPM recognized Musey's exclusive use of the terrace in multiple e-mails prior to commencement of litigation.

Moreover, the argument that Shapiro does not apply because Musey is not asking for the terrace to be returned to prior condition fails for two reasons. First, the prior condition of the terrace is irrelevant as the Proprietary Lease promises Musey the use and enjoyment of the roof and terrace. A terrace on which one cannot even walk is not usable at all, and a breach of the Proprietary Lease which promises the right of use – the main point of Shapiro. Second, the changes Musey is asking 425 East to make are precisely ones that would make the terrace suitable for its prior use documented by the:

1. Inspection Report;
2. Co-executor of the prior owner's estate;

[1] 425 East and DEPM would have been aware that a landscaper was working on the apartment, as they would have had to let him in. For them to know this and hold that Ms. Kaufman did not use the outdoor areas of her apartment is false, and at minimum, highly disingenuous.

3. Prior owner's landscape architect; and

4. Items remaining on the terrace itself including a) a large retractable awning; b) well-worn doors and steps onto the terrace; c) water and electrical service on the terrace connected to the Apartment's branch utility lines (see Paragraph 2 and Exhibit 21 annexed to the affidavit of J. Armand Musey sworn to on February 25, 2014 and submitted in further support of his motion for summary judgment "Musey Affidavit II" and Exhibit 21).

The above items are also consistent with Chaney's statement regarding ordinary expected use of a terrace (see Exhibit 22 annexed to the Musey Affidavit II.) Shapiro also shows that the defendants' argument that the terrace was built solely for utility purposes (see Deboer affidavit), and not recreational use, is irrelevant. Ms. Kaufmans' extensive use of the terrace also undermines the defendants' argument that the new terrace surface is identical to the prior one (an argument notably absent from either of building engineer Sean Daley's affidavits). The old terrace clearly supported extensive use, while the new one, by the defendant's own admission cannot even withstand walking.

2) Current Terrace Membrane Prevents Maintenance

The current terrace membrane is so delicate it prevents proper care of the terrace area. As a result, according to George Greenberg, Kawaree Narine sent the board an e-mail in the fall of 2013, indicating that if Musey did not cover the terrace the building would likely need to do it themselves so that it could be used for maintenance purposes (see Paragraph 4 of the Musey Affidavit II). By Chaney's own admission, the terrace membrane is very thin and can't support clearing of snow and ice (see Exhibit 23 to the Musey Affidavit II). Additionally, as Musey has not been able to access the roof or terrace to clear the drains, at least one of them froze in

January 2015, causing water to back-up on the roof and freeze and creating a leak in his apartment. DEPM has indicated that the building waterproofing company, Standard Waterproofing Co., whose president and CEO, Andrew Wist, is apparently Chaney's brother-in-law,[2] would repair the roof (see Exhibit 24 annexed to the Musey Affidavit II). As of yet, these repairs have not yet been made. (see Paragraph 6 of the Musey Affidavit II).[3]

C. 425 East Must Provide Musey with a Habitable Roof

As clearly established in Musey's moving papers, he is entitled to summary judgment and a declaration that 425 East must make the roof habitable. In desperate attempt to avoid the inevitable, 425 East argues that it does not have to make the roof habitable because: (i) the newly installed air conditioner and supplemental water pump makes the roof unsuitable for use; (ii) if Musey were permitted to use the roof, then the other unit owners below his Apartment would have a right to use his terrace; and (iii) 425 East does not have install a parapet surrounding the perimeter of the roof. Certainly these arguments, like much of waterproofing work done by Chaney's brother-in-law, hold no water and must be disregarded.

1) The presence of Musey's air conditioner compressor prevents use of the roof.

Musey installed an air condition compressor (the "Compressor") in the Spring of 2014 and made modifications to the roof to accommodate its installation using the alteration agreement for his Apartment. The Compressor occupies only a very small portion of the roof - less than four square feet - and should not interfere with its use. 425 East never indicated and Musey never agreed, in writing or verbally, that installation of the Compressor would prevent him from enjoying this right to use the roof. (see Paragraph 7 of the Musey Affidavit II). In any

[2] See Exhibit 26 of the Musey Affidavit II for evidence of Chaney's relationship with Andrew Wist.

[3] This appears to be similar to the drainpipe problem that precipitated the issues in Shapiro supra.

event, Musey is willing to make modify, enclose, move, or even remove the Compressor to the extent necessary to allow him to safely use the roof.

2) **The presence of the Building's supplemental water pump (the "Pump") prevent use of the roof**

425 East's assertion that because it installed the Pump on the roof the roof is no longer safe for habitation is wholly unsupported as a matter of law. 425 East cannot be rewarded for its wrongful actions in changing the condition of the subject property. Towner v. Berg, 5 A,D.2d 481, 487, 172 N.Y.S.2d 258 (3rd Dept. 1958). Clearly, 425 East must not be rewarded for making the roof unfit for occupancy. The Pump was installed AFTER Musey's February 2013 purchase of the Apartment and without consulting him or advising him that it would affect his use of the terrace (see Exhibit 25 annexed to the Musey Affidavit II).

In addition, Proprietary Paragraph 7 gives 425 East the right to install certain equipment on the roof:

> The Lessor shall have the right to erect equipment on the roof, including radio and television aerials and antennas, for its use and the use of the lessees in the building and shall have the right to access thereto for such installations and for the repair thereof.

However, this paragraph does not allow 425 East to unilaterally make an alteration to the roof that completely deprives Musey of his right to enjoy the use of this portion of the Apartment. To the extent the Pump presents a dangerous condition created by 425 East that prevents Musey's use, 425 East must modify, enclose, relocate or remove the Pump to allow Musey's use of the roof. Any needed alterations to the Pump modifications should be simple and not burdensome for 425 East. The Pump, like the Compressor, occupies only a very small portion of the roof and has no external moving parts that are likely to be dangerous (see Paragraph 10 of the Musey Affidavit II).

As building staff and others at times access the Roof to service the water tower, elevator mechanicals, supplemental water pump, chimneys and other items, it must be made safe to protect these workers and Musey when he needs to access his air conditioning compressor.[4] 425 East cannot let it remain in a state where, as stated by building engineer Sean Daley in his affidavit submitted in opposition to this application ("Daley Affidavit"), "no one should be spending any time." Interestingly, the roof, which was repaired by the first contractor in the recent façade/roof/parapet project was replaced with a protective "cap sheet" and the surface is thus able to withstand ordinary usage. This contrasts sharply with Musey's terrace, which was replaced by Standard Waterproofing, Corp. Chaney's brother-in-law's firm,[5] and does not have such a standard protective layer.

3) Allowing Musey to use the Roof would enable the Shareholder of Apartments below Musey to use his Terrace.

425 East makes the disingenuous argument that if Musey has rights to the roof (area above his Apartment), then the shareholders below him would have rights to the roofs above their apartment, which is the Terrace outside of his Apartment, and that Musey would not desire

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[4] 435 East has a central heating system paid for by shareholder maintenance. However, the rooms of the Apartment with severely worn terrace doors have regularly been well below legal minimum heat levels (sometimes below 50 degrees Fahrenheit). As a result, Musey has been using his air conditioner (which is designed to act as a heater when run in reverse) to heat those rooms of the Apartment at his own expense. Due to the severe winter, he has needed to access the compressor, sometimes in the middle of the night, to clear it of snow and ice so that it can continue to operate (see Paragraph 9 of Musey Affidavit).

[5] Soon after Chaney joined the Board of 425 East as president in 2011, the Board replaced the contractor on the building's multi-year, multi-million dollar façade/roof/parapet repair project, mid-stream, and assigned it to Standard Waterproofing Corp. Standard Waterproofing's president and CEO is Chaney's brother-in-law, Andrew Wist. Upon information and belief, the relationship between Chaney and Standard Waterproofing has not been disclosed to shareholders generally. As Chaney may have had a personal interest in saving his brother-in-law money, it is understandable that he did not want to question the decision to leave the terrace unprotected and instead improperly attempt to force Musey to bear that cost. Likewise, the parapet work was done at the end of the project, and not raising the parapets on the roof to the legally required height may have also saved his brother-in-law time and money. (see Paragraph 11 and Exhibit 26 annexed to the Musey Affidavit II).

this outcome. This argument is false because the Proprietary Lease clearly allocated roof rights only to the Penthouse Apartments. More specifically, Paragraph 7 of the Proprietary Lease states, ".... the Lessee shall have and enjoy exclusive use of the terrace or balcony or that portion of the roof appurtenant to the penthouse." There is no provision in the lease allocating exclusive rights to use the roof (the areas above an apartment) to any apartment other than the penthouse apartments. In all apartments, including an apartment of a lower floor that have a terrace or balcony outside their apartment, the leaseholders of those apartments would enjoy the exclusive right to use that terrace or balcony. Thus, it is clear from a plain reading of the text of the Proprietary Lease that Musey has the exclusive right to use and enjoy the roof with its expansive unobstructed open areas above his apartment as well as the terrace outside it. This leads to a result that is logical and accords with common sense, especially as the roof above the apartment can only be accessed via a ladder on the back side of Musey's terrace (see Exhibit 28 annexed to the Musey Affidavit II).[6]

4) Parapet Height on the Roof Above Apartment

The Daley affidavit indicates that the roof is not subject to the 42-inch parapet requirement of Section 1509.8 of the New York City Building Code because the roof is not more than 22 feet above the surrounding lower roof (terrace). However;

a) The text of Section 1509.8 of the New York City Building Code bases the requirement on a building height of 22 feet. There are no allowances in the code

[6] As can be seen from the plans (see Exhibit 29 annexed to the Musey Affidavit II) and the pictures (see Exhibit 30 annexed to the Musey Affidavit II) there is plenty of open space on the roof suitable for use. Based on conversations with several residents, Musey understands that Board has been considering turning the roof into a common "roof deck" for the building. Not only is this inconsistent with their position that "no one should be spending time on the roof," but it is a clear violation of his rights of exclusive use. Musey believes this is the real reason 425 East seeks to deny Musey use of the roof (see paragraph 12 of Musey affidavit II).

for lower parapets over setbacks with less than 22 feet to the level below. Section 1509.8 of the New York City Building Code reads:

> **1509.8 Protective guards.** Buildings greater than 22 feet (6706 mm) in height with roof slopes less than 2.4 units vertical in 12 units horizontal (20 percent slope) shall be provided with a parapet, railing, fence, or combination thereof, not less than 42 inches (1067 mm) in height. Railings or fences may be located inward from the face of the exterior wall a distance not exceeding 6 feet (1829 mm). Railings or fences shall be of noncombustible material, except on buildings of Type V construction. Railings shall be constructed to comply with the requirements of Sections 1012 and 1607.7.[7]

As the 425 East Roof is flat, it has a slope less than 20%. 425 East has 17 floors, each with interior ceiling heights of at least 9 feet, it is clearly greater than 22 feet. As such, a plain text reading of 1509.8 requires that the roof have 42-inch parapets.

b) Furthermore, Section 1012 requires protective guards on open sides of landings, mezzanines, and platforms that are more than 30 inches above the floor:

> **Section BC-1012. Guards.** This section requires the installation of guards on the opensides of stairways, ramps, landings, mezzanines, and platforms that are more than 30 inches above the floor, except for certain occupancies and building elements. The height of guards and spacing between balusters are detailed in this section but reasonable exceptions are provided for assembly seating areas so as not to hinder lines of sight. The current code has similar requirements but provides no explicit exception for assembly areas.
>
> This section further requires guards at porches and decks over 30 inches above the floor and at mechanical equipment that are located within 10 feet of roof edge or that are more than 30 inches above the floor. The current code generally requires guards at exterior balconies, exit stairs, fire escapes, and ramps but only addresses the detail provisions of guards through the exterior corridor provisions in a limited way. The section provides the necessary provisions in a clear way to safeguard the occupants.

Clearly, the upper roof is a platform that is more than 30 inches above the terrace below (approximately 11 to 13 feet above). As such, 425 East is required under Section 1012 to install safety guards on the edge of the roof above this apartment.

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[7] See: http://www.nyc.gov/html/dob/downloads/pdf/cc_chapter15.pdf

c) 425 East cannot rely on any "grandfathering" argument to evade the parapet height rules. In NYC v. 60 West 76th Street - Managing Agent Appeal No.1100643 (September 22, 2011), the court found that the defendant was required to bring parapets up to the standard of the current code when the repaired them. In fact, the building engineer Sean Daley, himself applies the Section 1509.8 standard in evaluating the parapet heights, acknowledging that they fall under this section of the code. According to affidavits of Chaney, Daley and Narine, 425 East preformed extensive parapet repair on the building over the past few years. As there have been significant problems with the process and shareholder unrest, Frank Chaney's brother-in-law's company, Standard Waterproofing, Corp. has been forced to return to do additional repairs, including parapet rebuilding (see work permit in Exhibit 26 annexed to the Musey Affidavit II indicating parapet rebuilding as part of the scope of work).[8]

d) Even if the parapets are "grandfathered," prior to the 1968 rules, N.Y. MDW. LAW § 62 applies and also calls for 42" parapets for buildings built after April 18, 1929:

Section 62: Parapets, guard railings and wires

1. Every open area of a roof, terrace, areaway, outside stair, stair landing, retaining wall or porch and every stair window of a multiple dwelling erected after April eighteenth, nineteen hundred twenty-nine, shall be protected in a manner approved by the department by a parapet wall or a guard railing three feet six inches or more in height above the level of such area, or, in the case of a stair

[8] There are also open Environmental Control Board Violations and Department of Buildings Violations concerning the maintenance & safety of the building's facade. Items are open as to Certifying Correction on a Hazardous Violation and failure to file the required Local Law 11 Reports (Local Law 11 concerns facade maintenance and repair). Source: www.nyc.gov/buildings (accessed February 24, 2015).

window, above the level of the floor adjacent thereto, unless the department shall deem that such protection is not necessary for safety.[9]

425 East's certificate of occupancy was August 29, 1929, more than four months AFTER the April 19, 1929 (a copy of the Certificate of Occupancy is annexed as Exhibit 31 to the Musey Affidavit II . If, for some reason, the N.Y. MDW Law § 62 does not apply, we do not know of any minimum parapet height lower than 24 inches for ANY NYC building. This is significantly higher than the current 12 to 15 inch level on the roof above 425 East.

e) Even if, as DEPM's Karel DeBoer's states (see Deboer Affidavit), the roof was only designed to be for "utilitarian" purposes, its use must be converted to accommodate Musey's enjoyment per the Proprietary Lease as part of the 1987 Co-Op conversion which promises these areas for Musey's use and enjoyment. The court in Shapiro made it clear the building must make the necessary upgrades. Moreover, this conversion triggers application of new code (post 1968), nullifying the grandfathering provision and requiring 42-inch parapets in the unlikely event that they were not required anyway.

f) Regardless of the building code requirements, it is clearly unsafe for people to use and occupy a roof with the current barrier of only 12-15 inches (see Exhibit 30 annexed to the Musey Affidavit II) to protect against a fall of 11 to 13 feet down to the 5 to 10 foot narrow landing below. Should someone fall and miss the landing (very possible at its more narrow 5 foot points that are a below significant portion of the roof (see Paragraph 13 of the Musey Affidavit II and attached

[9] Available at: http://codes.lp.findlaw.com/nycode/MDW/3/2/62

Exhibit 29), they would fall an additional 150 feet to the sidewalk below. This would obviously endanger them and anyone who happened to be on the sidewalk below. New York City Administrative Law Code, Section 28-301.1 dictates that the building's owner's responsibility includes a requirement that, "All buildings and all parts thereof and all other structures shall be maintained in safe condition."

As Musey has the exclusive right to use this area, the building has an obligation to make it safe for his use and enjoyment, to access his air conditioning compressor, and for workers who needs to access the area to service the building mechanicals located there. Moreover, the warrant of habitability provides imposes a similar safety provision for Musey's use and enjoyment. Park West Management Corp. v. Mitchell, 47 N.Y.2d 316, 391 N.E.2d 1288, 1294 (1979). The safety provision in the Warrant of Habitability is not limited to building code compliance Park West Management Corp. v. Mitchell, 319 N.Y.2d 1294. As such, 425 East must increase the parapet height to a safe level. Such a level is clearly much higher than the current 12 to 15 inch level. The vast majority of the roof space consists of desireable open unencumbered area (see Paragraph 12 of the Musey Affidavit II). The only reason the roof is a place where, according to Daley "no one should be spending any time" is because the parapets are too low.

Accordingly, since Musey has met his burden in establishing entitlement to summary judgment and the defendants have woefully failed to rebut such presumption, a declaration must be issued directing that 425 make the terrace habitable.

POINT II
PARAGRAPHS 4 AND 5 OF THE ROOF/TERRACE RULES MUST BE DECLARED NULL AND VOID

Once again the defendants fail to meet their burden to show that summary judgment should not be granted regarding plaintiff's request to declare that paragraphs 4 and 5 of the

Roof/Terrace Rules are null and void. The defendants argue that since Musey has not presented evidence that 425 East was ever financially responsible to maintain the terrace and roof, he has not shown that paragraphs 4 and 5 of the Roof/Terrace Rules shift such burden and are in violation of the Proprietary Lease. As set forth in detail in his moving papers, Musey has clearly shown how the implantation of paragraphs 4 and 5 of the Roof/Terrace Rules will shift the responsibility of maintaining the roof and terrace to him in direct violation of the Proprietary Lease. To summarize Musey's analysis;

1) Paragraph 2 of the Proprietary Lease requires 425 East to maintain all areas of the building expect those enumerated in Paragraph 18; and
2) Paragraph 18a limits Musey's maintenance responsibilities to the INTERIOR portions of the Apartment.

425 East attempts to confuse the matter by indicating that the maintenance requirements they are imposing on Musey only apply to his alterations of the terrace. The plain text of the Roof/Terrace Rules require Musey to engage in alterations in the terrace, regardless of whether he uses it, and to assume liabilities for those alterations forced upon him and to generally indemnify and maintain the terrace area. This is in spite of 425 East's argument that Musey does not even have exclusive use of the area. Despite numerous requests, and formal reconsideration of the Roof/Terrace Rules in both February 2014 and April of 2014, the Board has refused to change the language of the Rules to reflect the more limited obligations they are implying to the court.

To confuse the Court further about Musey's position, 425 East tries to hold Musey in a situation where he is currently not allowed to use the roof and terrace areas of his apartment. But

at the same time, 425 East won't give him any details about the (apparently significant) alteration demands they seek to place on him to comply with the rules until he provides 425 East with his terrace alteration plan. This is despite the fact he has repeatedly notified them that he has no such alterations plans. They are trying to hold him in a "never land" where he will never be able to point to the specific alteration and maintenance requirements made of him but he won't have use of the terrace unless he "caves" and agrees to submit an alteration plan he doesn't want at all. Presumably, any alteration plan will allow them to condition the additional requirements 425 East refuses to disclose on an unreviewable "business judgment" basis.

As a result of the foregoing paragraphs 4 and 5 of the House/Terrace Rules place a substantial financial obligation on Musey which violates the Proprietary Lease and therefore, they must be declared null and void.

POINT III
MUSEY IS ENTITLED TO SUMMARY JUDGMENT ON HIS BREACH OF CONTRACT CAUSE OF ACTION

In opposition to Musey's application for summary judgment on his breach of contract claim the defendants merely make the bald conclusory statement that since the plaintiff did not prove that 425 is in breach of the Proprietary Lease he is not entitled to damages. Tellingly, the defendants do not and cannot offer a shred of evidence to support this claim. Instead, the defendants argue that the extent of the damages should be limited to the difference between the rent reserved in the lease and the fair market value during the period of the breach. As a result of the foregoing, this Court should grant plaintiff's motion for summary judgment and direct that an inquest be held to determine the proper award of damages for breach of contract and an award of attorneys' fees and costs incurred pursuant to Real Property Law Section 234.

CONCLUSION

As a result of the foregoing, Musey's application for summary judgment must be granted in its entirety.

Dated: New York, New York
February 25, 2015

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