Index No. 157316/2014
(Wooten, J.)

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

J. ARMAND MUSEY,

Plaintiff,

-against-

425 EAST 86 APARTMENTS CORP.,

Defendant.

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO RE-ARGUE AND FOR LEAVE TO AMEND AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR LEAVE TO RE-ARGUE

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Preliminary Statement

This memorandum of law is submitted on behalf of the defendant, 425 East 86 Apartments Corp. (the "Co-op):[1] (a) in opposition to the motion submitted on behalf of the plaintiff, J. Armand Musey ("Plaintiff"), seeking leave to reargue the decision and order of this Court dated July 16, 2015 (the "D&O"), and upon reargument, to reverse the determination not to grant Plaintiff the requested declaration that the Co-op is required to deliver to Plaintiff a roof terrace in "habitable" form; (b) in opposition to Plaintiff's motion for leave to amend his complaint; and (c) in support of the Co-op's cross-motion seeking leave to reargue the D&O, and upon reargument to grant summary judgment in its favor on the fourth cause of action, which seeks relief under the theory that the Co-op breached the proprietary lease agreement between the parties by failing to install a protective surface over the roof membrane immediately outside Plaintiff's apartment.

The decisive factor in resolving these cross-motions is that this Court has previously determined that the rules adopted by the Board concerning the roof space at issue are not null and void (which determination is not the subject of Plaintiff's motion for reargument). By this decision, this Court has effectively determined that these rules are in full force and effect. Among these fully effective and enforceable rules is the rule requiring "all shareholders owning an apartment with an adjoining roof terrace" – such as Plaintiff – to "protect[] at all times" "[t]he roof membrane" "from foot traffic, planters, deck covering, furniture and/or other objects." As this rule is incorporated into and made part of the proprietary lease between the parties, Plaintiff is contractually-bound to afford himself the relief he asks the Court to provide him by revisiting its prior decision declining to issue a declaration directing the Co-op "to take all actions required

[1] While included in the caption on Plaintiff's moving papers, all defendants other than the Co-op have been dismissed from this action.

to make the roof habitable" and by allowing him to amend his complaint to pursue various theories of liability, all premised upon the overarching concept that the Co-op is contractually-bound to install surfacing over the roof membrane.

In essence, this Court's prior determination that the rules governing the use of the roof space at issue are fully effective requires that Plaintiff be denied all the relief sought in connection with the instant motion based on the theory that the Co-op must install a protective surface over the roof membrane, rendering it what Plaintiff terms to be "habitable." On the other hand, this Court's prior determination as to the validity of the roof rules requires that, upon reargument, the fourth cause of action, seeking relief under the theory that the Co-op breached the proprietary lease by not installing a protective surface over the roof membrane, be dismissed.

In addition, Plaintiff's motion suffers from further fatal flaws. Plaintiff's motion for reargument is premised upon the concept that this Court failed to appreciate the import of the Shapiro decision, which Plaintiff mistakenly believes to be dispositive of the issues at bar here. As the Shapiro case is distinguishable, and in any event, there is no indication that the Court failed to appreciate the inapposite nature of the Shapiro decision, Plaintiff cannot demonstrate that upon reargument, the Court ought to award Plaintiff summary judgment on that portion of his third cause of action by declaring that the Co-op is required to provide him with a "habitable" terrace area.

With regard to that portion of Plaintiff's motion seeking leave to amend his complaint, Plaintiff fails to demonstrate that any of the causes of action asserted in the proposed amended complaint are sustainable, thereby failing to provide a basis for allowing him to amend his pleading to assert such claims.

For all of the reasons set forth at length hereinafter, Plaintiff's motion should be denied in its entirety and the Co-op's cross-motion ought to be granted.

Background

The Court's familiarity with the facts underlying this dispute is assumed in light of the parties' previous cross-motions for summary judgment. A short summary, however, follows to refresh the Court's recollection of the salient facts.

Plaintiff is the owner of the shares and the holder of the proprietary lease (the "Lease") appurtenant to Penthouse A (the "Apartment") in the cooperative apartment building (the "Building") owned by the Co-op. See Compl. at ¶¶ 13, 18, 19.[2] Over a year ago, on or about July 25, 2014, Plaintiff commenced this action against the Co-op, its property manager and nine individual current and former members of the Co-op's board of directors (the "Board") based upon the over-arching theory that the roof space immediately outside of the Apartment is a "terrace" that he owned and could use to the exclusion of all other occupants of the Building, but which nevertheless is to be maintained by the Co-op at the Co-op's sole expense. See generally, Sugarman Aff. Exhibit 4. Based upon this premise, Plaintiff purported to assert four causes of action as follows:

> (1) breach of fiduciary duty by the current and former Board members by virtue of their having adopted new rules pertaining to the roof space at issue and by treating Plaintiff differently than they treated the owner of the only other penthouse apartment in the Building;
>
> (2) fraud by the individual current and former Board members by allegedly failing to inform Plaintiff, prior to his purchase of the Apartment, of certain information concerning the roof space at issue;

[2] A copy of the Complaint, dated July 25, 2014, is annexed as Exhibit 4 to the affirmation of Stuart Sugarman, Esq., dated August 19, 2015 ("Sugarman Aff."), submitted in connection with Plaintiff's motion.

(3) request for a declaration that certain rules pertaining to the roof space at issue are null and void and directing the Co-op "to take all actions required to make the roof habitable, including, but not limited to, the installation of flooring surface over the terrace membrane enabling it to withstand ordinary expected use," and to "replace the exterior doors to the [Apartment];" and

(4) breach of the covenant of quiet enjoyment contained in the Lease, by the Co-op and DEPM, by their allegedly failing to provide Plaintiff with a roof "that is habitable and that will allow for his exclusive private enjoyment."

Sugarman Aff. Exhibit 4. After submitting a timely answer with a counterclaim for an award of attorney's fees, by notice of motion dated November 4, 2014, the Co-op, its managing agent ("DEPM") and the individual Board member defendants moved for an order pursuant to CPLR Rule 3211(a)(7) dismissing the Complaint, with prejudice, and/or pursuant to CPLR Rule 3212, granting summary judgment in their favor.[3] See Sugarman Aff. Exhibits 2-31, 37-41. Plaintiff opposed this motion on its merits and affirmatively cross-moved for partial summary judgment in his favor on his third and fourth causes of action, for dismissal of the affirmative defenses raised by the Co-op, DEPM and the individual Board member defendants and for an award of attorney's fees. See Sugarman Aff. Exhibits 32-36. Oral argument on the motions was held on April 1, 2015, and thereafter, the D&O was issued. See Affirmation of Charles D. Krieg, dated August 19, 2015 ("Krieg Aff.") Exhibit 1.

In deciding the cross-motions, the Court made the following determinations:

(1) "None of the individual Board members are liable here under any cognizable legal theory," Id. at p. 6;

(2) The first and second causes of action – for breach of fiduciary duty and fraud – are time-barred. See id. at p. 7;

[3] Co-defendant, George Greenberg ("Greenberg"), made a motion for the same relief, by notice of cross-motion dated February 11, 2015. See Sugarman Aff. at Exhibits 42-45.

(3) That portion of the third cause of action seeking a declaration that the rules pertaining to the roof space at issue are null and void is time-barred. See id. at p. 8;

(4) Plaintiff is not entitled to a declaration directing the Co-op "to take all actions required to make the terrace habitable, including, but not limited to, the installation of flooring surface over the terrace membrane enabling it to withstand ordinary expected use," as, among other things, such a declaration would be inconsistent with "the agreement executed by the Board and Greenberg in 1990, when Greenberg upgraded the adjoining roof area, at his own expense." Id. at p. 9;

(5) "The issue of the doors is fact-dependent," and therefore, "cannot be summarily dismissed." Id.;

(6) The fourth cause of action – for breach of the Lease – is dismissed as asserted against DEPM "because it is not a party to th[e L]ease, and it is not liable in its role as managing agent." Id. at p. 10;

(7) Because "[t]he issue of exclusivity of use of the terrace is unsettled," and in any event, Plaintiff has defied the rules pertaining to this space so far, the fourth cause of action, as asserted against the Co-op, is not subject to dismissal at this time. Id.; and

(8) Greenberg is properly dismissed from the action. See id.

Accordingly, by virtue of the D&O, all that remains of the Complaint is that portion of the third cause of action seeking a declaration that the Co-op is directed to "replace the exterior doors to the [Apartment]," and the fourth cause of action, as asserted against the Co-op, only, seeking $500,000.00 in damages based upon the notion that the Co-op breached the Lease by failing to install a protective surface over that portion of the roof membrane immediately outside the Apartment. All other parties and claims are no longer part of the lawsuit.

On August 19, 2015, Plaintiff filed a Notice of Appeal of the D&O, as well as the instant motion. See E-Filed Doc. Nos. 95.[4] By this motion, Plaintiff seeks leave to: (1) reargue the D&O and upon reargument, to grant him summary judgment on his third cause of action seeking a declaration that the Co-op is required to provide Plaintiff with a "habitable terrace;" and (2) for leave to amend the Complaint to assert specious allegations that have no bearing on any of the legal theories pursuant to which relief is sought, to add factual allegations to support his breach of contract claim, and to add three entirely new causes of action, none of which are sustainable.

For all of the reasons set forth at length herein, Plaintiff's motion should be denied in its entirety and the Co-op's cross-motion should be granted.

Argument

POINT I

LEAVE TO REARGUE SHOULD BE GRANTED AND UPON REARGUMENT, THE COURT SHOULD GRANT SUMMARY JUDGMENT TO THE CO-OP ON THE FOURTH CAUSES OF ACTION AND LEAVE THE REMAINDER OF THE D&O UNDISTURBED

A motion for leave to reargue pursuant to CPLR Rule 2221(d) "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion . . . ." CPLR Rule 2221(d); see also Mendez v. Queens Plumbing Supply, Inc., 39 A.D.3d 260 (1st Dep't 2007) ("The court properly granted reargument upon a showing that it had 'overlooked or misapprehended the facts or law or for some reason had mistakenly arrived at its earlier decision.'") (internal citation omitted). It is respectfully argued that the Court, in making its determination that the roof rules were in full force and effect, should have also determined that because one of these rules specifically requires Plaintiff to install a protective surface over the roof membrane immediately outside the Apartment – which Plaintiff has failed and refused to

[4] The Co-op filed a Notice of Cross-Appeal on the same date. See E-Filed Doc. No. 97.

do – he is not entitled to the relief sought in his fourth cause of action under the theory that the Co-op breached the Lease by failing to install such surfacing. The Court should have granted summary judgment in the Co-op's favor on the fourth cause action, which cause of action seeks $500,000.00 in damages based on the premise that the Co-op has "failed and refused to make the terrace and roof habitable for [Plaintiff's] quiet enjoyment." Compl. at ¶71; see also id. at ¶70.[5]

As the roof rules are specifically incorporated into and made part of the Lease, see Sugarman Aff. Exhibit 8 at ¶¶ 7, 13, *Plaintiff* – not the Co-op – is contractually-bound to "install a protective covering over the terrace membrane which would allow [Plaintiff] to exercise his right to quiet enjoyment of the terrace," Compl. at ¶25. See Sugarman Aff. Exhibit 19 at Rule No. 4. For Plaintiff to obtain the relief he seeks in connection with the fourth cause of action, the Court would have to disregard the plain meaning of the Lease terms and the roof rules and instead, re-write the agreement between the parties, which it plainly may not do. See Laba v. Carey, 29 N.Y.2d 302, 308 (1971); FCI Group, Inc. v. City of New York, 54 A.D.3d 171, 177 (1st Dep't 2008) ("It is likewise settled that a court should not 'rewrite the terms of an agreement under the guise of interpretation.'") (internal citation omitted).

Moreover, a plaintiff seeking relief under a breach of contact theory must show that he has complied with all terms of the agreement he claims has been breached by the defendant. Here, Plaintiff has not installed the roof membrane protection he is required to install. His having breached this roof rule should have resulted in a finding that his fourth cause of action – seeking relief under the theory that the Co-op breached the Lease – may not be maintained as a

[5] To the extent that Plaintiff argues that the Co-op has somehow denied that he has exclusive use of the roof "terrace" space immediately outside the Apartment, that is incorrect. At no time has the Co-op taken that position. What was argued in connection with the underlying dismissal motion is that because Plaintiff brought his lawsuit and asserted standing on the premise that he ***owned*** the "terrace" space, see Compl. at ¶¶ 13, 18, 19, standing could not be demonstrated as Plaintiff indisputably does not own this "terrace" space. There has never, however, been a dispute as to Plaintiff's right to exclusive use of the roof space immediately outside of the Apartment – *i.e.*, of what he terms the "terrace."

matter of law and that summary judgment in the Co-op's favor was appropriate. See High Tech Enters. & Elec. Servs. of N.Y., Inc. v. Expert Elec., Inc., 113 A.D.3d 546, 547 (1st Dep't 2014) (reversing denial of motion for summary judgment dismissing breach of contract claim based upon the plaintiff's failure to perform under the agreement at issue); Harris v. Seward Park Housing Corp., 79 A.D.3d 425, 426 (1st Dep't 2010) (the elements of a breach of contract claim "include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages.").

This Court should grant reargument and upon reargument, grant the Co-op's motion for summary judgment on the fourth cause of action in its entirety.

As to Plaintiff's motion for reargument,[6] he contends that reargument is appropriate because the Court "misapprehended the plain language of the Proprietary Lease," and if it had not done so, pursuant to the decision rendered in Shapiro v. 350 E. 78th Street Tenants Corp., 85 A.D.3d 601, 603 (1st Dep't 2011), the Court would have entered a declaration directing the Co-op to make the roof space immediately outside of the Apartment "habitable." Pl.'s MOL at pp. 16-17. Plaintiff is incorrect, and not just for the reasons discussed above.

As is clear from the D&O itself, the Court reviewed and understood the Lease terms. The Court specifically noted in its opinion that "[i]t is only plaintiff's reading of the proprietary lease that would oblige [the Co-op] to favor him as it has no other owner." Krieg Aff. Exhibit 1 at p. 9. The Court well understood that Plaintiff's unique interpretation of the Lease does not require

[6] While the Affidavit of James Cicalo, AIA, sworn to August 13, 2015 ("Cicalo Aff.") is not referred to in that portion of Plaintiff's brief expressly addressed to the motion for leave to reargue, at paragraph 4 of the Cicalo Affidavit, Cicalo states that his affidavit is submitted "in support of Plaintiff's motion to renew and reargue and to amend the complaint." Putting aside the fact that Plaintiff has not moved for leave to renew, he may not, in the guise of a motion for leave to reargue, submit new evidence in support of new arguments not previously proffered in connection with the underlying motion. See William P. Pahl Equipment Corp. v. Kassis, 182 A.D.2d 22, 27 (1st Dep't 1992); Foley v. Roche, 68 A.D.2d 558, 568 (1st Dep't 1979) ("'A motion for reargument is not an appropriate vehicle for raising raising new questions.'") (internal citation omitted). Accordingly, the Cicalo Affidavit may not be considered in connection with that portion of Plaintiff's motion that seeks leave to reargue.

the Co-op to deliver to Plaintiff a "terrace" "in a form permitting use for its intended purpose," whatever that undisclosed intended purpose may be. Pl.'s MOL at p. 16. In this regard, the Court correctly noted that such interpretation would be directly contrary to the Co-op's treatment of the roof space immediately outside the only other penthouse apartment in the Building – owned by Greenberg. Krieg Aff. Exhibit 1 at p. 9. Specifically in that regard, the Court acknowledged the 1990 agreement between the Co-op and Greenberg whereby Greenberg undertook the obligation to install rubber tiles over the roof surface in order to transform a "service" roof into an "entertainment" roof. See id.

Moreover, the Shapiro decision is distinguishable because there – unlike here – the plaintiff had covered the roof space appurtenant to her apartment with wooden decking, furniture and planters, which – upon the request of the co-op – she removed in order to facilitate inspection of and repairs to the roof below her decking as a result of major leaks. See Shapiro, 85 A.D.3d at 602. Once these items were removed, it was determined that the roof itself was not structurally sound enough to withstand the weight of the materials previously installed thereon by the plaintiff. See id. The plaintiff sought an injunction requiring the defendant cooperative to make repairs to the roof necessary to *restoring* her prior use of the roof, which injunction was granted. See id. at 603. In other words, the court granted the plaintiff's request for a structurally sound roof, and specifically did not grant the requested declaration that the plaintiff had the absolute right to install whatever she wished over the roof surface, much less at the co-op's expense. See id. Here, Plaintiff is not contending that the Co-op has failed and refused to provide him with a structurally-sound roof over which he can install materials to transform the roof space into a terrace. Rather, Plaintiff merely contends that the Co-op has not placed a

covering over the roof membrane, which covering would allow him to use this space as an "entertainment terrace." See Sugarman Aff. Exhibit 4 at ¶¶ 25, 56.

Having failed to show that the Court overlooked or misapprehended any fact or principle of law in rendering its decision that Plaintiff is not entitled to a declaration directing the Co-op to provide him with a "habitable" "terrace," Plaintiff has failed to demonstrate that upon reargument, the Court should do anything other than adhere to its prior decision declining to grant Plaintiff the declaratory relief sought in his third cause of action.

POINT II

LEAVE TO AMEND SHOULD BE DENIED

A motion for leave to amend should be denied where, as here, a proposed amendment to a complaint is lacking in merit. See Silver v. Murray House Owners Corp., 126 A.D.3d 655, 656 (1st Dep't 2015) ("The motion court improvidently exercised its discretion in granting plaintiff's motion [for leave to amend his complaint] because the proposed amendment lacks merit."); 36 East 57th St. LLC v. Falic, 117 A.D.3d 434, 435 (1st Dep't 2014) ("The motion court did not improvidently exercise its discretion in denying defendant's motion to amend the answer to assert" defenses lacking in merit); Mosaic Caribe, Ltd. v. AllSettled Group, Inc., 117 A.D.3d 421, 421-22 (1st Dep't 2014) ("[t]he court applied the correct standard in reviewing [the] motion for leave to amend the complaint. The court correctly noted that if the proposed amendments are totally devoid of merit and legally insufficient, leave to amend should be denied."). This makes sense: granting leave to amend a complaint to assert new facts or claims that are lacking in merit results in, among other things, a waste of judicial resources. See NAB Constr. Corp. v. Metro. Trans. Auth., 167 A.D.2d 301, 302 (1st Dep't 1990) ("in determining whether to grant leave to amend, a court must examine the underlying merit of the cause[] of action asserted therein, since,

to do otherwise, would be wasteful of judicial resources."). Here, Plaintiff's motion for leave to amend should be denied based upon the lack of merit to the allegations and legal theories asserted in the proposed amended pleading.

First, portions of Plaintiff's proposed amended pleading are barred by the law of the case doctrine. See Lee v. Chun Ka Luk, 127 A.D.3d 612, 613 (1st Dep't 2015) (affirming denial of motion for leave to amend pleading to re-assert affirmative defense of statute of limitations when the defendant's motion for pre-answer dismissal on this same ground was previously denied based on the court's finding that the claims were timely asserted); Mohamed v. Defrin, 45 A.D.3d 252, 253 (1st Dep't 2007) (prior ruling by same court was the law of the case and rightfully relied upon in determining a subsequent motion for summary judgment). This doctrine is "an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter so far as Judges and courts of co-ordinate jurisdiction are concerned." Tischler v. Key One Corp., 67 A.D.2d 886, 886-87 (1st Dep't 1979). Such "sound policy" applies here to bar Plaintiff from re-litigating an issue that this Court already has determined.

This Court has already determined that Plaintiff is not entitled to a declaration directing the Co-op "to take all actions required to make the terrace habitable, including, but not limited to, the installation of flooring surface over the terrace membrane enabling it to withstand ordinary expected use," as, among other things, such a declaration would be inconsistent with "the agreement executed by the Board and Greenberg in 1990, when Greenberg upgraded the adjoining roof area, at his own expense." Krieg Aff. Exhibit 1 at p. 9. Such a declaration would also be inconsistent with the Court's prior determination that the roof rules – including Rule No. 4 – are valid, thereby placing squarely on *Plaintiff* the obligation to install a covering over the roof membrane. Nevertheless, Plaintiff includes in his proposed amended complaint a request

for a declaration that the Co-op "is obligated, pursuant to the Proprietary Lease, to effect repairs to render the terrace usable for its intended purpose." Krieg Aff. Exhibit 2 at ¶40. Obviously, such a request for declaratory relief cannot be obtained under the circumstances presented here.

Additionally, at paragraph 34 of the proposed amended pleading, Plaintiff alleges that he "has performed all of his obligations required under the Proprietary Lease." Krieg Aff. Exhibit 2 at ¶34. This is directly contrary to this Court's prior finding that Plaintiff has "so far" "defied" the Co-op's roof rules (which, per the express terms of the Lease are part and parcel of the Lease), Krieg Aff. Exhibit 1 at p. 10; Sugarman Exhibit 8 at ¶¶ 7, 13.[7] Therefore, it is the law of this case that Plaintiff has failed to perform his obligations under the very same agreement he claims that the Co-op has breached. As discussed at page 7 herein, as a result, Plaintiff cannot make a *prima facie* showing of entitlement to relief under a breach of contract theory and therefore, should not be given leave to amend to assert this patently meritless claim.

Second, even if all the "facts" asserted in the proposed amended pleading are deemed to be true –despite the fact that they are not true – Plaintiff nevertheless cannot demonstrate entitlement to the relief requested.

With regard to the proposed first cause of action seeking relief under a breach of contract theory, to the extent that it is premised upon a breach of the covenant of quiet enjoyment found in paragraph 10 of the Lease, this provision states, in relevant part, as follows:

> The Lessee, ***upon*** paying the rent and ***performing the covenants and complying with the conditions on the part of the Lessee to be performed as herein set forth***, shall, at all times during the term hereby granted, quietly have, hold and enjoy the apartment ***without any let, suit, trouble or hindrance from the Lessor*** . . . .

[7] Additionally, as noted above, as Plaintiff admittedly has failed and refused to abide by the roof rule requiring him to protect the roof membrane, he has admittedly violated the Lease.

Sugarman Aff. Exhibit 8 at ¶10 (emphasis supplied). As noted in the previous paragraph, this Court had already found that Plaintiff has not met the condition precedent to obtaining the benefits of this quiet enjoyment provision as he has "defied" the roof rules, which are part and parcel of the Lease. Also problematic for Plaintiff is that it is not the Co-op who has hindered Plaintiff's quiet enjoyment of the roof space outside of the Apartment; it is Plaintiff, himself, who has done so by withdrawing his application for the alteration of this space and otherwise failing to make this space that which can be quietly enjoyed by him. See Sugarman Aff. Exhibit 4 at ¶27 ("In October 2013, Musey informed DEPM that he was withdrawing his alteration plans for the terrace. He currently has no terrace or roof alteration plans pending."). This is decidedly not a scenario akin to that found in Washburn v. 166 East 96th Street Owners Corp., 166 A.D.2d 272 (1st Dept 1990), wherein the co-op seized 2/3 of the roof area allocated to the exclusive use of penthouse owner plaintiff and declared it "common property," effectively evicting him from that space and thereby breaching the covenant of quiet enjoyment. The Co-op has not seized any portion of the disputed roof area or otherwise evicted Plaintiff from same.

Further, to the extent that this proposed amended cause of action is premised upon a breach of paragraph 7 of the Lease allowing Plaintiff exclusive use of "that portion of the roof appurtenant to the penthouse," Plaintiff has not alleged how he has been deprived of such "exclusive use." Nowhere within the four corners of the proposed amended pleading is it alleged that – like in Washburn – the Co-op has seized any portion of this space or otherwise precluded Plaintiff from using this space. Again, it is Plaintiff's own obstinacy that has precluded his use of this area.

Next, as to the second proposed cause of action for declaratory relief, in addition to the law of the case doctrine problem, there is the additional problem that it is patently untrue that

Plaintiff is without an adequate remedy at law. Putting aside the fact that Plaintiff declines to elucidate the Court or the Co-op as to what the "intended purpose" of the "terrace" is, Plaintiff has always had the ability to improve the roof space immediately outside the Apartment to transform it into an entertainment terrace by submitting an alteration application to the Co-op for its approval. Similarly, it has been within his power to replace the three doors leading from the Apartment to the roof space. The *only* obstacle that has prevented Plaintiff from having the use of the roof space immediately outside the Apartment "for its intended purpose" is Plaintiff's stubborn refusal to undertake the work himself. If he had chosen to do so, he would still have the legal remedy of pursuing a breach of contract claim against the Co-op to recoup the monies he incurred in connection with undertaking the work himself if the Court were to determine that such work should have been undertaken by the Co-op, at the Co-op's expense. Plaintiff has *chosen* to essentially "cut of his nose to spite his face" by opting to litigate this issue and wait for a determination rather than remedying the situation himself.

Where, as here, a plaintiff has an adequate remedy at law, "extraordinary" equitable relief in the form of a declaration may not be obtained. See Dweck v. Oppenheimer & Co., 30 A.D.3d 163 (1st Dep't 2006) (affirming motion to dismiss declaratory judgment cause of action where, *inter alia*, the plaintiff had an adequate remedy at law in the form of money damages); Automated Ticket Sys., Ltd. v. Quinn, 90 A.D.2d 738, 739 (1st Dep't 1982) (reversing denial of cross-motion to dismiss claim for declaratory relief where the plaintiff had the ability to pursue and was pursuing damages for the same alleged "wrong"). The declaratory relief sought here serves no "practical or useful purpose" in light of Plaintiff's ability to pursue monetary damages

under a breach of contract theory, and as a result, this cause of action may not be maintained and leave to amend the complaint to assert this claim must be denied.[8] Id.

Moving on to Plaintiff's entirely new third cause of action seeking an injunction "ordering [the Co-op] to complete the necessary repairs to render the terrace usable for its intended purpose," Krieg Aff. Exhibit 2 at ¶48, this proposed new claim is entirely duplicative of the second cause of action seeking a declaration that the Co-op "is obligated . . . to effect repairs to render the terrace usable for its intended purpose," id. at ¶40, and it suffers from the same legal infirmity. Where, as here, a plaintiff has an adequate remedy at law, he is not entitled to injunctive relief. See Regini v. Board of Managers of Loft Space Condo., 107 A.D.3d 496, 497 (1st Dep't 2013) (reversing denial of motion to dismiss claim for injunctive relief where the plaintiff had an adequate remedy at law); Lemle v. Lemle, 92 A.D.3d 494, 500 (1st Dep't 2012) (affirming grant of motion to dismissal claim for permanent injunction where "there [was] no showing that plaintiff does not have an adequate remedy at law."); Mini Mint Inc. v. Citigroup, Inc., 83 A.D.3d 596, 597 (1st Dep't 2011) (affirming dismissal of claim for injunctive relief where "plaintiff failed to establish that it does not have an adequate remedy at law, namely monetary damages."). Since pursuing this cause of action would be futile, Plaintiff's request for leave to amend to assert same should be denied.

Plaintiff's proposed new fourth cause of action seeking relief under the theory that the Co-op has breached the warranty of habitability implied in the Lease cannot be maintained because this warranty does not apply to "terrace" spaces and moreover – as noted above – such

[8] With regard to that portion of Plaintiff's proposed amended second cause of action seeking a declaration that "the terrace appurtenant to the Unit is for Plaintiff's exclusive use," Krieg Aff. Exhibit 2 at ¶40(i), as addressed at footnote 5 hereinabove, at no time has the Co-op taken the position that the roof space immediately outside the Apartment is not for the exclusive use of Plaintiff. There is no controversy to be adjudicated in that regard.

space is only "uninhabitable" due to Plaintiff's stubborn refusal to improve this space and his preference to litigate over it instead.

The law is clear that a breach of the implied warranty of habitability claim may not be sustained premised upon the mere allegation that a tenant simply was deprived of the use of a terrace as guaranteed under a proprietary lease. See Jackson v. Westminster House Owners Inc., 2004 WL 5487453 (N.Y. Sup. Ct., N.Y. Co. Apr. 8, 2004) (dismissing breach of warranty of habitability claim premised upon loss of access to terrace where the plaintiffs did not show an impact on their health, safety or welfare).

The implied warranty of habitability was not intended to address every aspect of a tenacy; rather, it is intended to address only those conditions that may materially affect the health and safety of the tenant or deprive a tenant of an essential function of the leased residence. See Park West Mgmt. Corp. v. Mitchell, 47 N.Y.2d 316, 327 (1979) ("a landlord is not a guarantor of every amenity customarily rendered in a landlord-tenant relationship."); Port Chester Housing Auth. v. Mobley, 6 Misc.3d 32, 34 (N.Y. Sup. Ct., App. Term, 9th/10th Dists. 2004) (quoting Park West Mgmt. Corp. and finding that the landlord did not breach the warranty of habitability to quadriplegic tenant by failing to provide a roll-in shower). "[A] landlord is not required to ensure that the premises are in perfect or even aesthetically pleasing condition; he does warrant, however, that there are no conditions that materially affect the health and safety of tenants." Park West Mgmt. Corp. v. Mitchell, 47 N.Y.2d at 328. Plaintiff does not allege that his health or safety is materially impacted, but only that his "terrace" "is currently uninhabitable" because the Co-op did not install over the roof membrane a surface allowing for foot traffic, etc., the installation of which is (by roof rule No. 4), the obligation of Plaintiff. Krieg Aff. Exhibit 2 at ¶50. There is nothing barring Plaintiff from using the roof-top space outside his Apartment other

than his own lack of willingness to abide by the Co-op's rules with respect thereto, which require him to, *inter alia*, protect the roof membrane from foot traffic, planters, deck covering, furniture and/or other objects.[9]

Finally, even if the Court is inclined to grant any portion of the motion for leave to amend, certain paragraphs of the proposed amended complaint should be stricken for the simple reason that these paragraphs assert "facts" that have absolutely no relationship to any of the causes of action asserted. Specifically, new paragraphs 9, 10, 11, 13, 14, 15 n.1 and 17 do not tie into any of the four causes of action and instead, seem either to be the basis for Plaintiff engaging in what can best be described as a "fishing expedition" to gather information to make further amendments to the complaint or are vestigial holdovers from the original complaint, relating only to claims that have been dismissed.

For example, paragraphs 9 and 17 contain allegations about a relationship between a principal of the company engaged by the Co-op to undertake Building repair work and a Board member. Such allegations do not factor into any of the four causes of action for declaratory relief, injunctive relief, breach of contract or breach of the implied warranty of habitability. This set of circumstances notwithstanding, Plaintiff has issued two non-party subpoenae directed toward discovering information pertaining to this wholly superfluous factual allegation and the implication that the relationship was somehow improper and/or has had a negative impact on

[9] In addition, even without looking to the roof rules, Plaintiff cannot demonstrate that the Co-op is responsible for any portion of the roof surface above the membrane itself. Just as the Co-op is responsible for the floor "slab" within in each apartment in the Building and each shareholder-proprietary lessee is responsible for the flooring installed above the slab, the Co-op is responsible for the maintenance of the roof membrane, but not for any flooring surface installed above the membrane. See Sugarman Exhibit 8 at ¶18(a). Certainly, the only other shareholder in the Co-op with roof space immediately adjacent to his apartment has accepted responsibility for installing a protective surface over the roof membrane, rendering that space suitable to his desired use, and he did so at his expense, accepting responsibility for same. See Sugarman Aff. Exhibit 7 at ¶17; Sugarman Aff. Exhibit 12. This, too, makes sense as it would be illogical to require all shareholders in the Co-op to contribute to the creation of a "habitable" terrace for the exclusive use of a sole shareholder.

Plaintiff and/or the corporation.[10] As these allegations have no bearing on the proposed causes of action – which, themselves, are unsustainable – the allegations should be stricken (invalidating the two subpoenae).

In addition, paragraphs 10, 11, 13, 14, 15 n.1 appear to be holdovers from the original complaint, which asserted claims for fraud and breach of fiduciary duty. These two claims, however, have been dismissed. The "facts" asserted in these paragraphs do not pertain to any of the four causes of action alleged in the proposed amended pleading and ought to be stricken, as a result.

[10] These two subpoenae are the subject of a motion to quash (Mot. Seq. No. 003). In this regard, it ought to be noted that counsel for the Co-op, in connection with the motion to quash, mistakenly advised the Court in the Affidavit of Drew Pakett, sworn to August 21, 2015 ("Pakett Aff.") at paragraphs 2 and 10 that Standard Waterproofing –*i.e.*, the company in which the board president's brother-in-law is involved – performed roof work to the Building. This is incorrect – which Plaintiff well knows. As part of Exhibit 26 to the Affidavit of J. Armand Musey, sworn to February 25, 2015 ("Reply Musey Aff."), submitted in further support of his cross-motion for summary judgment, and in which Plaintiff asserted the same spurious allegations at paragraph 11 thereof, Plaintiff annexed a New York City Department of Buildings work permit issued on March 3, 2014 to Andrew Wist of Standard Waterproofing, in which the description of work to be performed on the Building states, in relevant part: "ALTERATION TYPE 2 – FAÇADE REPOINTING AND REPLACING LINTELS AND WINDOW SILLS. WINDOW RESTORATION AT ALL FACADES AND PARAPET RECONSTRUCTION." Sugarman Aff. Exhibit 48. Remarkably absent from this description of work is any description of work concerning the replacement or installation of any roof surfacing.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that this Court deny Plaintiff's motion for leave to reargue and for leave to amend, grant the Co-op's cross-motion for leave to re-argue and upon re-argument grant the Co-op summary judgment on the fourth cause of action, and grant such other, further and different relief as it may deem just, proper and equitable.

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