SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

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NY County
Index No.: 157316/2014

J. ARMAND MUSEY,

Plaintiff-Appellant

-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-Respondents,

GEORGE GREENBERG,

Defendant.

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF/APPELLANT'S MOTION TO REARGUE AND FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

Dated: Purchase, New York
November 2, 2017

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Plaintiff J. Armand Musey ("Appellant" or "Musey") respectfully submits this memorandum of law in support of his motion to reargue portions of the Court's order dated October 3, 2017 pursuant to CPLR § 2221. More specifically, the Court erred in determining that any challenge to the Co-op's House Rules must be made via an Article 78 proceeding rather than a plenary action alleging breach of contract. Second, the Court erred in determining that the implied warranty of habitability does not apply to terraces. Third, the Court failed to consider Musey's argument that the respondent is equitably estopped from raising the statute of limitations as an affirmative defense. Fourth, the Court failed to address Musey's request for a declaration that he has exclusive use of his terrace. Finally, if the Court fails to grant the above relief, Musey seeks leave to appeal to the Court of Appeals.

STATEMENT OF FACTS

On or about February 27, 2013, Musey purchased a co-operative apartment (the "Apartment") which included a terrace (the "Terrace").[1] The proprietary lease for the Apartment ("Proprietary Lease") provided that the 425 East 86 Street Apartment Corp. ("Respondent") would maintain the Terrace. More specifically, paragraph 7 of the Proprietary Lease states:

[1]The Apartment has exclusive use of the Terrace.

> "[i]f the apartment includes a terrace, balcony, or a portion of the roof adjoining a penthouse, the Lessee shall have and enjoy exclusive use of the terrace or balcony or that portion of the roof appurtenant to the penthouse ..." R. 88, 652. Paragraph 10 of the Proprietary Lease grants Appellant quiet enjoyment of the Unit, including the Roof/Terrace, without any "let, suit, trouble or hindrance from the Lessor." R. 89, 652.

On or about July 27, 2013, the Respondent amended its house rules to contain specific provisions relating to the Terrace ("Amendments"). More specifically, the Amendments required Musey to: (i) undertake a renovation project to cover and protect the recently installed roof membrane (in an unspecified manner) to make the area accessible and trafficable; (ii) maintain the undefined greater "Terrace area;" and (iii) broadly indemnify the Respondent for any damages to the Respondent arising from or relating to the undefined Terrace area.[2] One of the many

[2] Paragraph 4 of the Amendments states: "The roof membrane shall be protected at all times from foot traffic, planters, deck covering, furniture and/or other objects. The Board of Directors may enlist the services of a professional engineer to determine the protection that may be required, and their determination will be final. Any costs related to such an evaluation shall be the responsibility of the Shareholder. Such protection may include but shall not be limited to a secondary membrane over the existing roof membrane, or installation of a separator pad. The Shareholder may also be required to obtain a warranty from the membrane or pad manufacturer, which warranty shall include, in addition to the new membrane or pad, any new installation/construction to be placed on the new membrane or pad."

Paragraph 5 of the Amendments states: "The Shareholder shall execute an agreement in a form acceptable to the Corporation accepting full responsibility for and indemnifying the Corporation against the cost of repairing any and all damage to the underlying roof membrane and any damage to the public areas and/or apartment(s) below, which is caused, directly or indirectly, by the planters, deck coverings and/or other objects placed on the roof terrace, the Shareholder's use of the roof terrace and/or other objects placed on the roof terrace or Shareholder's failure to properly maintain the roof terrace area. Such agreement shall be binding upon all successors in interest to the shareholder."

disingenuous motives behind such amendment was to offlay the cost of completing the Respondent's recent renovation project to Musey. More specifically, the Respondent failed to complete its repair of the Terrace and sought to shift the burden to re-install an undefined protective roof covering to Musey, even though such actions were clearly the responsibility of the Respondent under paragraph 25 of the Proprietary Lease which required the Co-op to restore the Unit (including the Terrace) to its "proper and usual" condition following repair-work. R. 99, 652.

On July 25, 2014, Musey commenced this action seeking to enforce his rights under the Proprietary Lease by asserting claims for breach of fiduciary duty, fraud, declaratory relief, and breach of contract. R. 54-72. On or about November 4, 2014, the Respondent moved to dismiss all of Musey's claims. The trial court granted in part and denied in part such motion ("Initial Order"), but most importantly did not dismiss Musey's claim for breach of contract. Thereafter, Musey sought to reargue the Initial Order as well as to amend his complaint to assert a claim for breach of the implied warranty of habitability. On or about January 26, 2017, pursuant to written order ("Supplemental Order," collectively referred to with the Initial Order as the "Orders") the trial court denied Musey's motion to amend and further dismissed the claim for breach of contract.

On or about October 3, 2017, this Court rejected Musey's appeal of the Orders ("Appellate Decision") and Musey now seeks to reargue the Appellate Decision because: (i) the Appellate Decision failed to recognize controlling law which provides that a claim for breach of proprietary lease is properly adjudicated as a breach of contract and does not compel a mandatory Article 78 proceeding; (ii) the Appellate Decision incorrectly held that the implied warranty of habitability does not apply to leased areas of a residential apartments it deems "amenities," such as terraces and (iii) this Court failed to address Musey's equitable estoppel argument as well as his request for a declaration that he has exclusive use of the Terrace. In the event this Court rejects Musey's motion to reargue, Appellant respectfully requests that he be given leave to appeal the Appellate Decision to the Court of Appeals so that: (i) the discrepancy between the First and Second Department's holdings regarding the warranty of habitability can be reconciled; and (ii) inconsistent holdings relating to whether claims for breach of a proprietary lease are properly adjudicated as contract disputes or are subject to mandatory Article 78 proceedings can be addressed.

ARGUMENT

As set forth in detail below, Appellant's application to reargue should be granted and an order entered vacating the Appellate Decision because the Court: (i) mistakenly found that the Amendments are not in breach of the Proprietary Lease;

(ii) erroneously held that the warranty of habitability does not apply to terraces; and (iii) failed to address Musey's equitable estoppel argument as well as his request for a declaration that he has exclusive use of the terrace. Finally, should this Court deny Appellant's application to reargue, he should be granted leave to the Court of Appeals to appeal the Appellate Decision to determine whether: (i) challenges to amendments to house rules, which are in conflict with the terms of a proprietary lease, must be brought as an Article 78 proceeding; and (ii) the implied warranty of habitability applies to terraces.

POINT I
APPELLANT SHOULD BE GRANTED LEAVE TO REARGUE, AND UPON REARGUMENT, THIS COURT SHOULD HOLD THAT THE BOARD IS IN BREACH OF BOTH THE PROPRIETARY LEASE AND THE IMPLIED WARRANTY OF HABITABILITY

New York Civil Practice Law and Rules ("CPLR") 2221 states in relevant part:

> (d) A motion for leave to reargue.... 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion...

A motion for reargument is addressed to the discretion of the court. *Rivera v. Benarotti,* 29 A.D.3d 340, 341, 815 N.Y.S.2d 44 (1st Dept 2006). Such a motion is proper when the court overlooked or misapprehended matters of law or fact. *Belrose Fire Suppression, Inc. v. Stack McWilliams, LLC,* 51 A.D.3d 485, 858 N.Y.S.2d 126 (1st Dept 2008).

As set forth in detail below, this Court erred in determining that: (i) the challenge to the Amendments should have been brought as an Article 78 proceeding: (ii) the implied warranty of habitability does not apply to leased areas of a residential apartments it deems an "amenity," such as terraces; (iii) failing to give proper analysis to Musey's argument that Respondent is equitably estopped from raising the statute of limitation as an affirmative defense and (iv) failing to address Musey's request that this Court issue a declaration that he has exclusive use of the Terrace.

A. Appellant's Claim is Properly Framed in a Plenary Action, and this Court Erred in Ruling that Such Claim was Exclusively the Subject of an Article 78 Proceeding

Appellant sought redress for breach of the Proprietary Lease. Paragraphs Seven (7), Ten (10), and Twenty-Five (25) of the Proprietary Lease provide Appellant rights to exclusive use and quiet enjoyment of the Terrace, and obligate Respondent to return it to its "proper and usual" condition following repair-work. R. 88-9, 99, 652. Further, Paragraph Six (6) of the Proprietary Lease guarantees that Appellant's proportional "rent or cash requirements" [to shares held] cannot be increased without his express consent. R. 87-88. Respondent flagrantly breached the Proprietary Lease by: 1) terminating their renovation project without making the Terrace usable; and 2) shifting the cost of repair, maintenance and indemnification of the Terrace area from Respondent to Appellant. The Court found, in error, that

Appellant's grievance was one that must mandatorily be commenced as an Article 78 proceeding. R. 16-19.

This Court misapprehended the fact that if the Amendments breach the terms of the Proprietary Lease the proper remedy stands in a breach of contract action and not an Article 78 proceeding. CPLR § 7801 provides that "relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article . . . ." The Court of Appeals has made clear that these writs still govern judicial power under Article 78: "the nature of the alleged grievance [still] determines . . . the form of the hearing before the court to which the aggrieved party is entitled, the questions to be determined at such hearing, and the relief which the court has power to grant." *Newbrand v. City of Yonkers*, 285 N.Y. 164, 174-5, (1941). More particularly, CPLR § 7803 states that "the only questions" that may be raised in a proceeding under this article are, in pertinent part, ". . . whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." If a case does not raise one of these questions, it is outside the scope of Article 78. *See New York City Health and Hosp. Corp. v. McBarnette*, 84 N.Y.2d 194 (1994). Accordingly, this is not the standard for determining whether Respondent is liable

for breach of the proprietary lease.[3] Moreover, since Musey's claim is one sounding in breach of contract, an Article 78 proceeding cannot provide him with the relief he seeks under RPL §234 for attorney's fees. Thus, it is clear that an Article 78 proceeding is not the correct vehicle for Musey's claims.

Courts have traditionally held that breach of contract claims are not appropriate for Article 78 resolution. A cooperative shareholder's exclusive rights of use pursuant to a proprietary lease is subject to contact law. The right to exclusive use is a contractual matter, even if that use is subject to reasonable regulation by building documents. *Shapiro v. 350 E. 78th Street Tenants Corp.*, 85 A.D.3d 601, 603 (1st Dept 2011); *Dinicu v. Groff Studios Corp.*, 257 A.D.2d 218, 244 (1st Dep't 1999); *Washburn v. 166 E. 96th St. Owners Corp.*, 166 A.D.2d 272 (1st Dep't 1990). It is also indisputable that breach of proprietary lease claims based on coop board decisions are subject to the six-year statute of limitations for breach of contract. See *Estate of Del Terzo v 33 Fifth Ave. Owners Corp.,* 136 AD3d 486, 488 (1st Dep't 2016); *Konigsberg v. 333 E. 46th St. Apt. Corp.,* 2016 N.Y. Slip. Op. 31180(U) (N.Y. Co. Sup. Ct. June 21, 2016). The fact that the courts have opined on the statute of limitations relating to contract claims on alleged breach of a proprietary lease provides ironclad proof that such claims are not the exclusive province of Article 78

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[3] Moreover, since Musey's claim is one sounding in breach of contract, an Article 78 proceeding cannot provide him with the relief he seeks under RPL §234 for attorney's fees.

Proceedings. As a result, it is indisputable that this Court incorrectly held that Appellant's claims were the exclusive province of Article 78 and therefore, Musey's application to reargue must be granted.[4]

B. This This Court Erred in Upholding the Trial Court's Denial of Appellant's Motion for Leave to Amend Based on the Fact that the Implied Warranty of Habitability Does Apply to Terraces

The trial court denied Musey's motion to amend his pleading to assert a cause of action sounding in breach of the implied warranty of habitability because it incorrectly held that such warranty does not apply to leased areas of the apartment it deems "amenities" such as terraces. As reflected in Real Property Law Section 235-b(1), the purpose of the warranty of habitability is also to ensure that premises are reasonably suitable for their intended purposes:

> [i]n every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and **all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties….. [emphasis added]**

Real Property Law Section 235-b(1) provides that the purpose of the implied warranty of habitability is to ensure all areas of the premises are reasonably suited

[4] The Appellate Decision (page 6) incorrectly states that Appellant attempted to repackage his grievance as a breach of the proprietary lease because he takes issue with the new house rules. This was not the case, as noted earlier in the Appellate Decision, Appellant commenced this action seeking a declaration that the Amendments were in breach of the Proprietary Lease. This Court's attempt to distinguish *Shapiro* and *Estate of Del Terzo* is misplaced because those cases, like this one, involve actions taken by the boards in violation of the shareholders proprietary leases.

for their intended purposes. *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, 325, 418 N.Y.S.2d 310 (1979). See also *Solow v. Wellner,* 86 N.Y.2d 582, 587-588, 635 N.Y.S.2d 132 (1995) ("A breach of warranty may be said to have occurred where the premises have not met the reasonable expectations of the parties"). As the Court of Appeals has recognized, "[i]t is a patent impossibility to attempt to document every instance in which the warranty of habitability could be breached . . . [e]ach case must, of course, turn on its own peculiar facts." *Park West Mgmt. Corp. v. Mitchell*, 47 N.Y.2d 316, 327 (1979). The Court of Appeals in *Park West* also noted that a

> residential lease is essentially a sale of shelter and necessarily encompasses those services which render the premises suitable for the purpose for which they are leased . . . If, in the eyes of a reasonable person, defects in the dwelling deprive the tenant of those essential functions which a residence is expected to provide, a breach of the implied warrant of habitability has occurred. *Id.* at 328.

In addition, the Second Department recently interpreted the *Solow* holding to absolutely apply to terraces. In *Goldhirsch, supra,* 2016 N.Y. App. Div. 2016 N.Y. Slip Op. 6060 (2d Dep't Sept. 21, 2016), the Second Department unanimously awarded damages based on breach of implied warranty of habitability and breach of proprietary lease, on summary judgment, when a Co-op's repairs to a terrace left it unusable for several years. It also granted the shareholder summary judgment on the breach of implied warranty of habitability. The Second Department noted:

> "In *Solow v Wellner* (86 NY2d 582, 587-588), the Court of Appeals clarified that Real Property Law § 235-b(1) includes three separate covenants: "(1) that the premises are fit for human habitation, (2) that the premises are fit for the uses reasonably intended by the parties, and (3) that the occupants will not be subjected to conditions that are dangerous, hazardous or detrimental to their life, health or safety" (*id.* at 587- 588 [internal quotation marks omitted]). "A breach of warranty may be said to have occurred where the premises have not met the reasonable expectations of the parties" (7-82 Warren's Weed New York Real Property § 82.22 [2016])."

Under the Proprietary Lease, Appellant is properly entitled to a functioning and safe terrace. The Court of Appeals in *Park West* noted that the warrant of habitability cannot address "every aspect of a tenancy." R. 43. However, the warranty of habitability would be meaningless if a lessor could avoid its responsibilities by simply putting the area in question in such a state of disrepair that it is unusable. Physical access to a leased space is a reasonable expectation of a lessee that is certainly foreseeable by both parties. Respondent breached the implied warranty of habitability by effectively removing access to and use of the Terrace through its failure to restore the Terrace to a usable condition after the completion of its renovations. As a result of the foregoing, Musey's motion to reargue should be granted to allow him to pursue his cause of action sounding in breach of the implied warranty of habitability.

C. This Court Erred in Failing to Consider Appellant's Argument that The Respondent is Equitably Estopped from Raising the Statute of Limitations as a Defense

Even assuming arguendo that Appellant was mandated to commence an Article 78 proceeding to protect his rights, this Court erred in finding the Statute of Limitations commenced running on July 23, 2013, because Respondent is equitably estopped from raising the statute of limitations as a defense.

Under the doctrine of equitable estoppel, "a defendant is estopped from pleading a statute of limitations defense if the plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action." *Ross v. Louise Wise Svcs., Inc.*, 8 N.Y.3d 478, 491 (2007). Appellant provided factual evidence concerning the Respondent's repeated communications with Appellant concerning the applicability of the Amendment during the second half of 2013 and through July, 2014. As noted in Appellant's appellate brief and throughout the record, Appellant was actively encouraged to participate in negotiation and revision of the proposed rules, and to do so without his counsel involved. R. 229-33, 273. Therefore, in all circumstances, Respondent should be estopped from raising the statute of limitations as an affirmative defense. Accordingly, Musey's motion to reargue must be granted and this matter returned to the trial court for a factual determination on whether Respondent is equitably estopped from invoking the statute of limitations as an affirmative defense.

D. The Court Failed to Address Musey's Request for a Declaration of Exclusive Use

Appellant has the undisputed contractual right to exclusive use of the Terrace, as it is part of his apartment as defined on the first page of the Proprietary Lease. Even Respondent's long-time attorney, Herb Cohen wrote, "[u]nquestionably, the terrace is part of Musey's apartment and unquestionably he has the exclusive right to occupy it." (R. 283). The 2nd Department recently ruled unanimously in the shareholder's favor on this exact issue.[5] Throughout the litigation in the trial court, Respondent argued that Musey did not have exclusive access to the Terrace. To accept Respondent's argument that this right does not encompass the right to actually use, enjoy or even access the space, would render the right to "exclusive use" and "tenancy" meaningless. The Appellate Decision failed to address Appellant's request for a declaration of exclusive use which Appellant now reiterates. Accordingly, this Court should issue a declaration that Musey has exclusive use of the Terrace.

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[5] See *Goldhirsch v. St. George Tower & Grill Owners Corp.*, 2016 N.Y. App. Div. LEXIS 5944, 2016 N.Y. Slip Op. 6060 (2d Dep't Sept. 21, 2016), the Court unanimously found the terrace was part of "the apartment" as defined in the lease. The lease had identical relevant terms to Appellant's lease.

POINT II
Leave to Appeal to the Court of Appeals Should be Granted

If this Court denies Musey's motion to reargue, this Court should grant Appellant's application to appeal the Appellate Decision to the Court of Appeals. First, the questions relate to a principle of law that will create confusion and will recur in litigation – can house rules which breach terms of a proprietary lease be challenged only through an Article 78 proceeding? Second, the issues before this Court affect the public interest – by allowing house rules to affect contract rights it shortens the statute of limitations from six (6) years to 120 days. Finally, the Appellate Decision creates a conflict between the First and Second Department of the New York State Courts – in the Second Department the implied warranty of habitability applies to terraces, while in this case, the First Department has determined that such warranty is inapplicable to leased areas it deems "amenities," such as terraces.

A. The Order Provides that Rules Enacted by a Co-op can Breach the Terms of a Proprietary Lease, which will Create Confusion, will Result in Litigation and Potentially Chill The New York Housing Market

The Appellate Decision creates precedent permitting material terms of a proprietary lease to be intentionally breached by enacting house rules and forcing all challenges thereto to be made *via* an Article 78 Proceeding to be filed within 120 days of such wrongful intentional act. Such a holding creates an unconscionable result and clearly conflicts with existing precedent, which unambiguously hold that

breaches of proprietary leases constitute claims for breach of contract. *Estate of Del Terzo v 33 Fifth Ave. Owners Corp., supra; Konigsberg v. 333 E. 46th St. Apt. Corp., supra.* As a result of the foregoing, this matter must be referred to the Court of Appeals to avoid future confusion.

B. The Issues before this Court Substantially Affect the Public

Should the Appellate Decision be undisturbed it will create a chilling precedent in this state. More specifically, it will force a shareholder to commence a law suit within 120 days of any house rule that breaches the terms of the respective proprietary lease. The Appellate Decision clearly shortens the statute of limitation from six years to 120 days for such a breach of contract claim so long as the Lessor later terms the breach a "rule," and eliminates any meaningful review if in fact 120 days had passed. This discrepancy will create confusion over when to commence an action. Perhaps more significantly, such confusion might result in an unintentional waiver of rights – i.e. an affected party believing it has six years to act when in actuality it has only 120 days. Such a short time frame, for example, could jeopardize the rights of a lender which is collateralized by a proprietary lease -- it might not even learn of an amendment for 120 days. The ultimate impact of such ruling could likely further impede the availability of co-op loans as lenders will be unwilling to assume such a tremendous risk to their security. Accordingly, this

Court should refer this case to the Court of Appeals to address this public policy issue.

C. **Conflict between Different Departments**

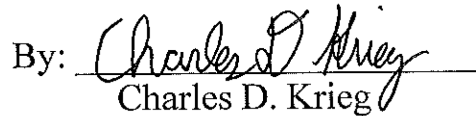
The Appellate Decision has created a conflict with the Second Department as to whether the implied warranty of habitability applies to terraces. In *Goldhirsch, supra,* the Second Department unanimously awarded damages based on breach of implied warranty of habitability and breach of proprietary lease (with identical relevant provision as Plaintiff's), on summary judgment, when a Co-op's repairs to a terrace similarly left it unusable for several years. This Court interpreted the Court of Appeals cases in the exact opposite manner – the implied warranty of habitability does not apply to areas it deem "amenities," such as terraces. As a result, this matter must be referred to the Court of Appeals to resolve the conflict between departments.

CONCLUSION

For the reasons set forth above, Appellant respectfully requests that this Court grant his motion to reargue in its entirety or in the event such application is denied to refer to this matter to the Court of Appeals for further determination.

Dated: New York, New York
November 2, 2017

Paykin Krieg & Adams LLP

By: 

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