

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

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J. ARMAND MUSEY,

Plaintiff,

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

-against-

425 EAST 86 APARTMENTS CORP.,

**AFFIRMATION IN
SUPPORT OF
MOT. SEQ. NO. 007**

Defendant.
-----X

TRACY PETERSON, an attorney duly admitted to practice before the courts of the State of New York, hereby affirms the following to be true under the penalties of perjury and pursuant to N.Y. C.P.L.R. Rule 2106:

1. I am a member of the law firm of Braverman Greenspun, P.C., counsel to the defendant herein, 425 East 86 Apartments Corp. (the “Co-op”). In such capacity, I am familiar with the facts and circumstances herein set forth.

2. This affirmation is submitted in support of the Co-op’s motion to strike and/or dismiss the Amended Complaint, dated July 27, 2021 (the “Amended Complaint”) and for the imposition of sanctions against the plaintiff, J. Armand Musey (“Plaintiff”) and the attorney who signed and filed the Amended Complaint, Tristan Loanzon, Esq. (“Plaintiff’s Counsel”).

3. While this case has been pending in this Court since July 2014, it originally was assigned to Justice Paul Wooten. As such, familiarity with the full, relevant factual and procedural background is not assumed.

4. Plaintiff commenced this action by the filing of Summons and Complaint dated July 25, 2014. See NYSCEF Doc. No. 001.

5. The lawsuit, at that time, primarily concerned Plaintiff's challenge to certain rules duly-enacted by the Co-op's board of directors (the "Board"), which addressed the use of terrace space adjacent to the two penthouse apartments in the Co-op's building (the "Roof Rules").

6. By notice of motion dated November 3, 2014, the Co-op (and its then co-defendants) moved to dismiss the Complaint pursuant to CPLR Rules 3211(a) or 3212. See NYSCEF Doc. No. 26.

7. Plaintiff opposed that motion and cross-moved for summary judgment in his favor, pursuant to CPLR Rule 3212, on two of the causes of action asserted in the original Complaint. See NYSCEF Doc. No. 62.

8. By Decision and Order, dated July 16, 2015 ("July 2015 D&O"), Hon. Paul Wooten largely granted the motion to dismiss pursuant to CPLR Rule 3211(a), leaving intact that portion of the original third cause of action seeking a declaration regarding the replacement of three doors "connecting the [Plaintiff's] Apartment to the adjacent roof" and the fourth cause of action. See NYSCEF Doc. No. 93 at p. 10.

9. Plaintiff's cross-motion for partial summary judgment was denied. See id. p. 11.

10. Plaintiff thereafter sought reargument of the July 2015 D&O, and leave to amend his complaint. See NYSCEF Doc. No. 99.

11. The proposed amended complaint asserted four causes of action against the Co-op:

(a) seeking a monetary judgment in excess of \$250,000.00 premised upon a purported breach of the proprietary lease between the parties (the "Lease") by the Co-op's allegedly (i) failing to "provide Plaintiff a terrace usable for its intended purpose for his exclusive enjoyment;" (ii) "hindering Plaintiff's quiet enjoyment of a portion of the Unit, *i.e.*, the terrace;" and (iii) "failing to restore the Unit (including the terrace) to its 'proper and usual' condition following the façade, roof and terrace repair project"

(b) seeking a declaratory judgment that “(i) the terrace appurtenant to the Unit is for Plaintiff’s exclusive use; (ii) [the Co-op] is obliged, pursuant to the [] Lease, to effect repairs to render the terrace usable for its [unspecified] intended purpose; and (iii) [the Co-op] is obligated, pursuant to the [] Lease, to maintain the three (3) exterior doors to the Unit that existed when Plaintiff purchased the shares referable to the Unit.”

(c) seeking an injunction “ordering [the Co-op] to complete the necessary repairs to render the terrace usable for its [unspecified] intended purpose”

(d) seeking a monetary judgment in excess of \$250,000.00 based on the Co-op’s alleged breach of the warranty of habitability set forth in N.Y. Real Property Law §235-b, on the grounds that the Co-op’s “installation of an improper surface has rendered the terrace unusable to be used as is”

NYSCEF Doc. No. 102 at pp. 8-11.

12. The Co-op opposed the motion for leave to reargue and to amend, and cross-moved for leave to reargue that portion of the July 2015 D&O that denied its motion to dismiss the fourth cause of action asserted in the original Complaint. See NYSCEF Doc No. 181.

13. By Decision and Order dated January 30, 2017 (the “January 2017 D&O”), Hon. Paul Wooten denied Plaintiff’s motion for leave to reargue the July 2015 D&O, denied his motion for leave to amend his complaint and granted the Co-op’s motion to reargue, and upon reargument, granted summary judgment in the Co-op’s favor on the fourth cause of action asserted in the original Complaint. See NYSCEF Doc. No. 197.

14. Among other things, in the January 2017 D&O, the Court was explicit that the “[L]ease and House Rules do not obligate the Co-op to renovate the roof and render it usable as a terrace at its own expense.” Id. at p. 11.

15. Plaintiff appealed the July 2015 D&O to the extent it granted the Co-op's (and its then co-defendants') motion to dismiss, and the January 2017 D&O to the extent it denied Plaintiff's motion for leave to amend.

16. The Appellate Division, First Department unanimously affirmed both the July 2015 D&O and the January 2017 D&O. See Musey v. 425 East 86 Apts. Corp., 154 A.D.3d 401 (1st Dep't 2017).

17. In so doing, the First Department confirmed that Plaintiff's challenges to the Roof Rules asserted in the original Complaint were time-barred by the four-month statute of limitations applicable to Article 78 proceedings. See id. at 403-04.

18. The First Department also affirmed the denial of Plaintiff's motion for leave to amend, concluding that the proposed first, second and third causes of action were "barred by the doctrine of the law of the case" – *i.e.*, that such claims are time-barred challenges to the Roof Rules – and the proposed breach of warranty of habitability claim was precluded by the fact that the warranty does not apply to "a terrace that is safe and suitable for plaintiff's own exclusive, outdoor use." Id. at 404-05.

19. By notice of motion dated November 2, 2017, Plaintiff sought reargument of the First Department's Decision and Order, or leave to appeal to the Court of Appeals. In connection with this motion to reargue, Plaintiff contended that the appellate court had "failed to address [his] request for a declaration of exclusive use" of the Terrace.¹ A copy of the relevant pages from this brief are annexed hereto as **Exhibit B**.

¹ Plaintiff has been pursuing this non-existent dispute for years, and I have been attempting to disabuse Plaintiff, for years, of the idea that the Co-op ever has taken the position that Plaintiff does not have exclusive use of the Terrace (subject to the terms of the Lease). One of the earlier examples of my attempts in this regard is found in an April 29, 2015 letter from me to Plaintiff's (former) counsel, Charles Krieg, which letter is annexed hereto as **Exhibit A**.

20. In opposing this reargument motion, the Co-op noted that Plaintiff had not sought a declaration regarding exclusive use of the Terrace in his Complaint and had not otherwise preserved the issue for appellate review. A copy of the relevant pages from this January 2, 2018 brief is annexed hereto as **Exhibit C**.

21. Also in this brief, the Co-op again noted that there is no justiciable claim in this regard as the “Co-op has never disputed Appellant’s right to exclusive use” Id. at p. 23.

22. The Appellate Division denied Plaintiff’s motion for leave to reargue or in the alternative, for leave to appeal to the Court of Appeals. See NYSCEF Doc. No. 210.

23. Undeterred, Plaintiff sought leave to appeal to the Court of Appeals, which the Court of Appeals denied by Order dated May 8, 2018. See Musey v. 425 East 86 Apts. Corp., 31 N.Y.3d 1065 (2018).

24. By notice of motion dated January 9, 2019, Plaintiff again sought leave to amend his complaint. See NYSCEF Doc. No. 215.

25. Plaintiff’s second proposed amended complaint contained five proposed causes of action:

(a) seeking a declaration that Plaintiff has the right of exclusive use of the roof over his penthouse apartment;²

(b) seeking “a declaration that [the Co-op] is obligated, pursuant to the [] Lease, to maintain the three (3) exterior doors to the Unit that existed when Plaintiff purchased the shares referable to the Unit and to repair the Terrace membrane to allow for proper drainage and be covered;”

(c) seeking an order “directing that [the Co-op] compels [owner of the only other penthouse apartment in the building] to comply with the provisions of the Roof/Terrace Standards;”

² Plaintiff also included in the proposed amended complaint allegations concerning the alleged “dispute” over his exclusive use of the Terrace. See id. at ¶¶ 9-10. 16-38. However, by not seeking relief in the form of a declaration that Plaintiff has exclusive use of the Terrace, Plaintiff tacitly acknowledged that this issue was not in dispute.

(d) seeking a money judgment in excess of \$100,000.00 based on the Co-op's alleged "refus[al] to acknowledge that Plaintiff has exclusive use of the Roof [over this penthouse apartment]" in breach of the Lease and by allegedly "failing to provide Plaintiff with a Terrace that is capable of being covered and converted into a habitable area;" and

(e) derivatively, on behalf of the Co-op, seeking an order directing the Co-op to compel the owner of the other penthouse apartment in the building to do certain things on and to his terrace.

See id. at pp. 22-26.

26. By Decision and Order dated June 21, 2019 (the "June 2019 D&O"), this Court largely denied Plaintiff's motion to amend, permitting Plaintiff leave to amend only to "add a breach of contract claim based on the [Co-op's] failure to provide plaintiff with a Terrace that is capable of being covered and converted into a habitable area." NYSCEF Doc. No. 254 at p. 11.³

27. The June 2019 D&O also "directed" Plaintiff "to file and serve and amended complaint consistent with [the Court's] decision. Id.

28. Plaintiff did not follow the foregoing directive.

29. Rather, by notice of motion dated July 25, 2019, Plaintiff sought leave to reargue the June 2019 D&O, in part. See NYSCEF Doc. No. 262.

30. This Court denied that motion for leave to reargue by Decision and Order dated March 24, 2020. See NYSCEF Doc. No. 292.

31. Plaintiff did not thereafter file an amended complaint consistent with the June 2019 D&O.

³ In its denial of leave to amend to assert the proposed first cause of action, this Court was explicit that the "exclusive use" provision in the Lease applied to the Terrace (but not the roof over the penthouse apartment). See NYSCEF Doc. No. 254 at pp. 7-8. In Plaintiff's subsequent memorandum of law in support of his motion to reargue the June 2019 D&O, Plaintiff explicitly acknowledged that "[w]ith respect to the space on the same level as the penthouse, which the parties have called the 'terrace' throughout the litigation, plaintiff's exclusive use over the terrace is a settled matter." NYSCEF Doc. No. 275 at p. 2, n.1.

32. In fact, Plaintiff did nothing. For five months after the issuance of the March 24, 2020 D&O, Plaintiff did not file an amended pleading or otherwise attempt to prosecute this lawsuit.

33. By Consent to Change Attorneys dated August 31, 2020, the law firm of Romer Debbas, LLP substituted in as counsel of record for Plaintiff, in the stead of Loanzon LLP. See NYSCEF Doc. No. 296.

34. In September and October 2020, Emil Samman, Esq. of Romer Debbas, LLP, was in communication with me regarding settlement of this action.

35. The last time that I spoke with Messr. Samman, however, was on or about October 29, 2020, after which time I heard nothing further from a representative of Plaintiff regarding settlement.

36. Since the end of October 2020, for the next nine months, Plaintiff did nothing to prosecute this lawsuit.

37. On July 27, 2021, Plaintiff – by Loanzon LLP, which is no longer counsel of record for Plaintiff – filed a purported “First Amended Complaint,” which pleading bears no resemblance to the original Complaint filed in this action, to the proposed amended complaint submitted to this Court in connection with Plaintiff’s 2019 motion for leave to amend or to the June 2019 D&O. See NYSCEF Doc. No. 297.

38. It is that pleading (hereinafter, the “Amended Complaint”) which is the subject of this motion.

39. The Amended Complaint bears no resemblance whatsoever to the proposed amended complaint submitted to this Court in connection with Plaintiff’s 2019 motion for leave to amend (NYSCEF Doc. No. 218) or to the leave to amend granted in the June 2019 D&O. By

way of illustration, annexed hereto as **Exhibit D** is a blacklined comparison between the 2019 proposed amended complaint and the Amended Complaint.

40. On July 28, 2021, I wrote to Tristan C. Loanzon, Esq. demanding that the Amended Complaint be withdrawn by 5:00 p.m. on July 30, 2021, short of which the Co-op would move to dismiss and for the imposition of sanctions on Plaintiff and Mr. Loanzon personally. A copy of this letter is annexed hereto as **Exhibit E**.

41. My assistant, Susan Tonic, also emailed a copy of this letter to Emil A. Samman, Esq., of Romer Debbas, LLP, counsel of record. A copy of the cover email, on which I was copied, is annexed hereto as **Exhibit F**.

42. I received no response to that July 28, 2021 letter from either Messr. Loanzon or Messr. Samman.

Dated: New York, New York
August 13, 2021



Tracy Peterson, Esq.

PRINTING SPECIFICATIONS STATEMENT

It is hereby certified pursuant to 22 NYCRR §202.8-b(c) that the foregoing Affirmation in Support was prepared on a computer.

Type: A proportionally spaced typeface was used as follows:

Name of typeface: Times New Roman

Point size: 12

Line spacing: Double

Word Count: In accordance with the word-processing system used to prepare the Affirmation in Support, the total number of words, inclusive of point headings and footnotes and exclusive of pages containing the caption, table of contents, table of authorities, proof of service, printing specifications statement, or any authorized addendum containing statutes, rules, regulations, etc. is **2,312**.

Dated: New York, New York
August 13, 2021



Tracy Peterson