SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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J. ARMAND MUSEY,

Plaintiff, Index No. 157316/2014

-against-

425 EAST 86 APARTMENTS CORP.,

Defendant.

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PLAINITFF J. ARMAND MUSEY'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

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Plaintiff J. Armand Musey ("Plaintiff" or "Musey") respectfully submits this memorandum of law in further support of his motion for leave to file an amended complaint.

STATEMENT OF FACTS

In its papers submitted in opposition to this application the Defendant 425 East 86 Apartments Corp. ("Defendant") disingenuously argues that it would be prejudiced if Plaintiff were permitted to file an amended complaint. In addition, the Defendant's arguments regarding the merits of the causes of action ("COA") contained in the proposed amended complaint ("PAC") hold no water. More specifically, the Defendant argues that the: (i) first COA for a declaration that Musey has exclusive use of the roof above his unit cannot stand because recent case law has interpreted the language of a proprietary lease to mean a unit owner does not have exclusive use of the roof; (ii) second COA seeking declaratory relief to direct the Defendant to repair the terrace membrane must fail because this issue was previously litigated; (iii) third COA for violation of BCL § 501 lacks merit because Musey is attempting to revive a dismissed claim sounding in breach of fiduciary duty; (iv) fourth COA for breach of the proprietary lease by the Defendant is meritless because Musey does not have exclusive use of the roof and the Defendant is not obligated to repair the terrace membrane; and (iv) fifth COA for a derivative claim to compel a shareholder to remedy hazardous conditions because the Plaintiff failed to plead with particularity demands made upon the Defendant to take action. As set forth in detail below, the Defendant's arguments are wholly without merit and must not be considered.

ARGUMENT

Defendant's opposition reads like a motion to dismiss rather than opposition to Plaintiff's motion for leave to amend. Plaintiff's motion under C.P.L.R. 3025(b) should be granted because Defendant could not and did not identify any prejudice other than stating that the amendment

would broaden the scope of and prolong the case. The case law does not support Defendant's position. (Defendant noted that Plaintiff's proposed amendment complaint is "an entirely new lawsuit," (opp. p. 9), which suggests that Defendant would rather confront a separate complaint rather than having the new claims litigated in this action.) Defendant challenges the merits of the proposed complaint in a motion to dismiss posture, but does not deny critical facts including: 1) Board minutes and other evidence, including court statements, that settled the issue of exclusive use for all areas of the roof; 2) that the Co-op's responsibility for the terrace membrane is settled and the current non-standard terrace membrane installation requires significant repair/replacement before it can be covered; 3) that fellow board member Greenberg's terrace is out of compliance with the Roof/Terrace Standards and applicate building/fire codes; or 4) that Musey is being treated materially differently than Greenberg or shareholder/lessees of C-line apartments in the Co-op. In that case, facts should be construed in favor of Plaintiff and the courts will "accord plaintiffs the benefit of every possible favorable inference." Goshen v. Mut. Life Ins. Co. of N.Y., 98 N.Y.2d 314, 325 (2002).

STANDARD UNDER C.P.L.R. 3025(b).

In MBIA Ins. Corp. v. Greystone & Co., Inc., 74 A.D.3d 499, 499 (1st Dep't 2010), the First Department upheld the Supreme Court's granting of the underlying motion to amend, and explained the low thresholds on such motions: "[on] a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations . .. , but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit."

The law does not require that Plaintiff must establish the merit of every claim in the proposed amended complaint. As the First Department ruled in Daniels v. Empire-Orr, Inc., 151A.D.2d 370 (1st Dep't 1989):

> [t]he analysis established by this court ... begins with a two-pronged test. First, the proponent must allege legally sufficient facts to establish a prima facie cause of action or defense in the proposed amended pleading .... The next step is for the nisi prius court to test the pleading's merit. The merit of a proposed amended pleading must be sustained, however, unless the alleged insufficiency or lack of merit is clear and free from doubt. ... The party opposing the motion to amend, therefore, must overcome a presumption of validity in favor of the moving party, and demonstrate that the facts alleged and relied upon in the moving papers are obviously not reliable or are insufficient .... This does not mean, however, that those facts need to be proven at this stage.

As explained below and in Plaintiff's moving papers, the proposed amended complaint "alleges legally sufficient facts to establish a prima facie cause of action", and "the merit of [the] proposed amend[ment]" is not "clear[ly]" lacking in merit. Id. In short, the facts simply "need not be proven at this stage" as Defendant demands and, as such, Defendant has failed to "overcome [the] presumption of validity [of the proposed amendments]" to which Plaintiff is entitled. Id. Therefore, the proposed amended complaint "must be sustained". Id.

Defendant does not argue that it will suffer prejudice as a result of the amendment. It only argues that the amendment was made five years after the case was commenced and would complicate discovery and trial, that paper discovery had been completed, and that the amendment cannot be used to "re-instate previously dismissed claims." (p. 9-10).[1] The Defendant attempts to mislead this Court by claiming that the Plaintiff seeks to relitigate his previously dismissed causes of action sounding in: (i) breach of contract for the Defendant's failure to provide the Plaintiff with a habitable terrace; and (ii) breach of fiduciary duty by the actions of the board in treating another shareholder differently than its treatment of Plaintiff. Moreover, the Defendant does not and cannot

[1] Paper discovery was minimal as Defendant's President, David Munves, claims to have left Co-op's e-mails on his employers' computer before his employment ended and was not able to recover them before being required to return the computer. After arguing in a previous matter about the highly sensitivity nature of Co-op documents, Musey v. 425 East 86th Corp. [Index no 158014/2016] Respondent's Memorandum of Law in Support of Motion to Dismiss, dated, November 9, 2016, it is ironic that Defendant's President places them on his former employer's computer to which he would have no expectation of privacy.

show that the COAs for: (i) a declaration that Plaintiff has exclusive use of the roof above his unit; (ii) declaration that Defendant must repair the terrace membrane; (iii) breach of the proprietary lease by Defendant's refusal to recognize Plaintiff's right to exclusive use of the roof and for failing to repair the terrace membrane; and (iv) derivative relief for an order directing Defendant to cure safety violations caused by a fellow board member shareholder, lack merit.

POINT I
THE FIRST COA STATES A CLAIM FOR DECLATORY RELIEF THAT PLAINTIFF HAS EXCLUSIVE USE OF THE ROOF

The cause of action in the PAC relate to facts and occurrences that occurred after the filing of the initial complaint. Plaintiff's COA for breach of contract and under Article 78 in the PAC stem from the Defendant's failure to acknowledge that the Plaintiff has exclusive use of the roof ("Roof") above his apartment ("Apartment").

Defendant's opposition argues that the issue of exclusive use has been "resolved years ago" (p. 10) but it does not explain that is was resolved in Plaintiff's favor in Defendant's 1999 Board meeting and confirmed in subsequent events.[2] Defendants are now disputing the previously settled matter by opining that Plaintiff does not have exclusive use of the "roof over the Apartment" because it does not "adjoin" or is "appurtenant" to the Apartment. Even if the matter were not previously settled, the two cases cited by Defendant, Huyck v. 171 Tenants Corp. and Rushmore v. Park Regis Apt. Corp. do not support the Defendant's position because they are both irrelevant and distinguishable. Rushmore actually supports Plaintiff's position because the court concluded that the terrace adjoining and appurtenant to the penthouse is for the exclusive use of the penthouse owner – a holding that Defendant should follow.[3] Rushmore is distinguishable in one important

[2] Including their Appellate Brief for Respondents dated April 18, 2017, stating, "There is no dispute over exclusive use", while being fully aware Plaintiff was asking for a declaration for exclusive use of the Roof and Terrace, as well as Defendant's other actions indicating the matter was previously settled.

[3] Defendant should have no issue with the court declaring that Plaintiff has exclusive use of the terrace.

aspect however. When the court held that the roof over the penthouse is not for the penthouse owner's exclusive use, it found so because the roof was "not necessary to give that owner usable enjoyment of the unit." In that case, Mr. Rushmore's affidavit was clear that he was not using the roof for any purpose, and more importantly, that he was given notice by the coop, at the time of his purchase, that the coop intended to re-open to other residents the roof over the penthouse. (see Supporting Affidavit of Stephen Rushmore dated November 19, 2016, annexed as Exhibit G to the affidavit of J. Armand Musey sworn to on February 26, 2019 and submitted in support of the herein application "Musey Affidavit"). In contrast, here, Musey alleged that he was given permission by Defendant to install heating and air-conditioning compressor on the Roof for his own use, and the Roof can only be accessed by going through the Apartment. Moreover, Defendant agreed to give him advance notice before accessing the area as they would with any other part of the Apartment. (PAC 22; Musey Affid. ¶ 22-23). Defendant does not dispute these facts.

The other case cited, Huyck v. 171 Tenants Corp., is inapplicable. In Huyck, the parties argued over the owners' exclusive use to a "rooftop" that surround a penthouse apartment. The rooftop or terrace adjoined the penthouse apartment, which the court concluded to be for the owners' exclusive use. There was no dispute over exclusive use of the roof above the penthouse apartment (and owners did not assert exclusivity over the roof above their heads), and therefore the court's holding (allegedly favorable to Defendant) has nothing to do with the issue in the instant

Plaintiff needs this Declaration due to Defendant's shifting positions in previously arguing he does not have such rights. Moreover, Defendant continues to muddle the issue. In their Memorandum of Law, Defendant argues that Paragraph 21(a) of the Proprietary Lease does not mention Terrace or Roof, implying neither is part of the "Apartment" described in Paragraph 21(a). Plaintiff's exclusive use of either or both areas under the proprietary lease depends on them being part of the Apartment as the Proprietary Lease has no provision for a "limited common element" or similar provision that would permit exclusive use of an area not part of the Apartment.

case. As a result of the foregoing, the PAC clearly satisfies the pleading requirements to state a cause of action for declaratory relief that the Plaintiff has exclusive use of the Roof.

POINT II
THE SECOND COA STATES A CLAIM FOR DECLATORY RELIEF DIRECTING THE DEFENDANT TO REPLACE THE TERRACE DOORS AND REPAIR THE TERRACE MEMBRANE

Plaintiff's second CAO for declaratory relief directing the Defendant "maintain the 3 exterior doors" and "repair the terrace membrane to allow it to drain properly and be covered" is properly plead. Plaintiff is not seeking to relitigate his previously dismissed claim. In addition, Plaintiff is not seeking an injunction and discussion of adequacy of money damages is irrelevant. Plaintiff is seeking a judicial declaration that the lease dictates that the Co-op must repair the doors and terrace membrane. Defendant has accepted responsibility for the terrace membrane before,[4] during[5] and after[6] recent litigation. Defendant's nonstandard terrace membrane installation needs significant repair and/or replacement before Plaintiff or Greenberg can add the legal covering Defendant successfully argued Plaintiff must install at his own cost. As clearly set forth in the PAC, the Plaintiff is not asking Defendant to make the terrace habitable. He is merely seeking to be provided with a membrane that he can cover and render the terrace habitable and usable as it

[4] E-mail from Defendant's corporate attorney dated April 1, 2014 stating "However, should the membrane become damaged for reason, unrelated to a penthouse shareholder's use of the terrace, such as defective manufacture or aging, then the Cooperative assumes repair or replacement responsibility."

[5] Several statements, including "The Co-op's new rules are not requiring him [Musey] to maintain the roof (i.e., the roof membrane and below), but only the portion above the roof membrane, which space he [Musey] wishes to have and enjoy to the exclusion of all other shareholders." And "The Co-op is responsible for the maintenance of the roof membrane, but not for any flooring surface installed above the membrane."

[6] Defendant's September 26, 2018 letter to Plaintiff stating, "The Board does not require you to make any alterations to the terrace area appurtenant to PH A. To be clear, 'Alterations' in this case means changes to the terrace surface, parapet walls, and other components that form part of the physical plant of the building…..Should the building's engineer determine that leaks in other units stem from problems with the structure of the terrace (and have not been caused by you Margaret or the occupants of PHB), the cost of the repairs will be paid by the cooperative."

was previously used. Such issue was clearly not previously litigated as Defendant has repeatedly accepted this responsibility.

To comply with his obligations, Plaintiff, as previously mentioned, initially offered to let Defendant do whatever work it reasonably believed was needed under the Roof/Terrace Standards per the court's decision, and to pay for it himself, provided the costs was allocated equitably with Greenberg. (Musey Affid. ¶ 6). Defendant rejected this offer. In good faith, Plaintiff then engaged (and paid over $20,000 in fees to date) to qualified professionals including an architect, a zoning expert, an engineer, and a designer, to ensure the project is done safely, legally and appropriately. Id. He has also paid a $2,500 alteration fee and submitted an alteration plan to Defendant. Id. Greenberg has done none of these things.

POINT III
THIRD CAUSE OF ACTION FOR VIOLATION OF BCL § 501

Defendant argues that the fifth COA for a derivative claim and this COA cannot stand because they both arise from the same "purported wrongs." (p.11). In addition, Defendant argues that Plaintiff is seeking to relitigate his previously dismissed breach of fiduciary duty cause of action and that BCL § 501 is inapplicable. As set forth below, such arguments hold no water and must be rejected.

A. Plaintiff's COAs for a Violation of BCL § 501 and the Derivative Claim can Both Stand

Careful reading shows that the third COA under BCL § 501 concerned unequal treatment of Musey relative to shareholder Greenberg. Unequal because Defendant has refused to enforce the written Roof/Terrace Standards (which Musey does not challenge anymore) against Greenberg. (PAC ¶ 65). To comply with the Roof/Terrace Standards, Musey in good faith offered to "pay for whatever Roof/Terrace covering and alterations Defendant deemed appropriate as well as other Building maintenance costs." (PAC ¶ 59).

Defendant has stated on numerous occasions that they are working with Greenberg to bring him in compliance, (id.), and evidence shows that Defendant has been saying the same things for five years. To date, Greenberg has neither taken any steps to comply with the Roof/Terrace Standards, nor has Defendant used its right to make the necessary alterations themselves and invoice Greenberg for the costs. Musey is being forced to spend hundreds of thousands of dollars on a construction project as a condition of his tenancy, a cost Defendant is unwilling to impose on any other shareholder. Defendant does not deny this. This illustrates the unequal treatment of Greenberg's situation and Musey's. (id.). Moreover, Defendant has been more willing to allow exemptions for Greenberg's request for "variance" from the Roof/Terrace Standards, while denying even the simplest request from Musey without any basis. (PAC ¶ 51).

Lastly, Defendant has repeatedly changed the Roof/Terrace Standards as an accommodation to Greenberg. Defendant admitted this courtesy was never given to Musey when arguing they that the rules were final for purposes of the statute of limitation. (PAC ¶ 57).[7] Apparently, they were only final for Musey and not Greenberg.

B. This COA is a result of Subsequent Events and is Not a Rehash of the Prior Claim for Breach of Fiduciary Duty

The Defendant disingenuously argues that this COA is an attempt to relitigate Musey's previously litigated claims sounding in breach of fiduciary duty. As set forth above, all of the acts and occurrences complained of herein occurred **after** the filing of the initial complaint. More

[7] In a footnote contained in the record on appeal at page 517 the Defendant states, "Throughout his affidavit, Musey states that certain emails contained representations that the Board was willing to or would amend the rules. See Musey Aff. at 'fl 18, 19, 23, 26, 27. However, upon review of the referenced emails, it is revealed that, in fact, no such representations were made. See Exhibits 9, 12, 15, 18, 19. In fact, at least one such email is express that the Board did not "see any reason for a wholesale redraft of the standards," Exhibit 9, and on February 28, 2014, Frank Chaney was express that the Board did "not anticipate making any further changes" to the rules. Id. at'l[7, Exhibit R. F"

specifically, the special treatment afforded board member Greenberg over the past five years. Moreover, the Defendant's violation of BCL § 501 is a continuing violation so even if the Court dismissed a similar allegation in 2015 based on statute of limitations, the same conduct and additional conduct have arisen since then. Defendant cannot be arguing that conduct occurring after the July 16, 2015 court decision are still barred by that decision, which was based on the statute of limitations. See Henry v. Bank of Ame., 147 A.D.3d 599, 601 (1st Dep't 2017) (holding that the "continuous wrong doctrine is usually employed where there is a series of continuing wrongs and serves to toll the running of a period of limitations to the date of the commission of the wrongful act").

C. BCL § 501 is Applicable

BCL § 501(c) "prohibits unequal treatment of shareholders holding the same class of shares." Wapnick v. Seven Park Ave. Corp., 240 A.D.2d 245 (1st Dep't 1997), one of the most fundamental tenants of corporate law. The plain text of the statute provides that "each share shall be equal to every other share of the same class." Defendant has been dogged in making Musey spend hundreds of thousands of dollars to comply with the Roof/Terrace Standards but uninterested in making Greenberg comply. Musey alleged that for over five (5) years, Defendant "has willingly failed and refused to force Board member Greenberg to comply with the Roof/Terrace Standards." (PAC ¶ 48). Defendant does not deny these facts.

Defendant maintains that BCL § 501 was not designed to address the unequal treatment alleged in the instant case, citing the case Moltisanti v. East River Housing Corp., 149 A.D.3d 530 (1st Dep't 2017). Defendant appears to suggest that in order for BCL§ 501 to apply, the terms of Musey's lease must be different from other shareholders (p. 26). This argument fails for two reasons. First, Defendant has argued Plaintiff's rights are different than Greenberg's when it

submitted an affidavit by board member Greenberg indicating Greenberg's rights to the terrace are different than Musey's.[8] Second, Defendant's pale reading is not supported by the plain text of BCL § 501 and by case law. Moltisanti did not delineate what kind of cases fall under BCL § 501(c), so it begs the question of the statute's scope. An unpublished case showed that BCL § 501 applies to unequal treatment of shareholders whether or not that unequal treatment is codified in the lease or not. In Isaksson v. Bd. of Dir. of 280 Mott St. HDFC, No. 151561/2016, 2017 NY Slip Op 32589(U) (Nov. 22, 2017 Sup. Ct. N.Y. Co.) (J.S.C. S. Hagler)[9], the cooperative sought payment from shareholder-plaintiff before assigning additional space in the building to the shareholder-plaintiff. Plaintiff was one of many shareholders who became eligible to receive additional space in the building, but only the plaintiff was asked by the cooperative to pay for the additional space. Without payment, plaintiff was not assigned the additional space. Plaintiff alleged that the cooperative's demand for payment (in light of its failure to collect payment from other shareholders) was discriminatory under BCL § 501(c). (p. 4). Thus, the court recognized that BCL § 501(c) apply to situations where a shareholder is treated differently from other shareholders, without regard to what the lease states. However, the court dismissed the complaint on statute of limitation grounds.

To accept Defendant's argument that massively unequal treatment of shareholders is acceptable as long as that is not codified in the lease would render BCL § 501(c) largely meaningless as a protection for minority shareholders. If Defendant also had freedom to treat

[8] Affidavit of Ryan Sestack, p.4 (Feb 11, 2015), "As one basis for dismissal of Plaintiff's complaint, Codefendants argue that Plaintiff lacks standing because he does not own the roof space, i.e., terrace, adjacent to his apartment. Greenberg's adoption of the Codefendants' legal position in this cross-motion should not be construed as, and is in fact expressly not, an admission that Greenberg himself does not have an ownership interest in his terrace. In this respect, Greenberg's interest in his terrace, the terrace adjacent to apartment PHB, differs from Plaintiff's claim to his terrace, the terrace adjacent to apartment PHA."

[9] The case is attached as Exhibit H to the Musey Affidavit.

shareholders unequally, it would turn Plaintiff's proprietary lease from an asset into an unlimited liability.[10] Greenberg is treated differently because he has been a shareholder for much longer period and have been Board president for many years until June 2011 and remains a Board member in good standing. Defendant also provides a far more expansive interpretation of exclusive use areas to C-line apartments exclusive use of the vestibule areas outside the B and C line apartments (home to three board members) than being afforded to Plaintiff. See Razzano v. Woodstock Owners Corp., 111 A.D.3d 522 (1st Dep't 2013) (sublet policy). As a result of the foregoing, the Plaintiff has clearly set forth a claim for violation of BCL § 501.

POINT IV
FOURTH CAUSE OF ACTION FOR BREACH OF CONTRACT

In opposition to the Plaintiff's COA for breach of contract the Defendant merely claims that the proprietary lease does not provide that Musey has exclusive use of the Roof and that it is not obligated to repair the membrane so that it can be covered. As set forth in Point I and II above, the Plaintiff, in accordance with the terms of the proprietary lease is entitled to exclusive use of the Roof and the Defendant's denial of his right is a breach of contract. Second, pursuant to the proprietary lease and the Defendant's own acknowledgements, the responsibility to maintain the terrace membrane is with the Defendant. Accordingly, Defendant failed to provide Musey with a membrane that is capable of being covered so that he can comply with the court's interpretation of the Roof/Terrace Standards and court decision and so that the terrace can be used as it previously had been is another breach of the proprietary lease. As a result of the foregoing, the Plaintiff has

[10] It's not much of an exaggeration to say Defendant's interpretation would place New York out of step with corporate law, not only with respect to other states in the country, but also compared to those accepted in nearly every other developed country in the world. As one of many examples of the nearly universal prohibition against unequal treatment of shareholders, it is enshrined in corporate governance standards for OECD. See, *Recommendation of the Council on Principles of Corporate Governance (Adopted 7/7/2015)*, Section II (OECD): https://legalinstruments.oecd.org/en/instruments/322

properly plead a cause of action sounding in breach of contract and is entitled to attorneys' fees in accordance with the proprietary lease.

POINT V
DERIVATIVE RELIEF ON BEHALF OF PLAINTIFF AND OTHER SHAREHOLDERS OF THE DEFENDANT

The COA is a derivative claim because it alleges, on behalf of all shareholders, that Defendant has refused to seek Greenberg's compliance with New York City building and fire safety codes, some elements of which are more expansive than the Roof/Terrace Standards. Greenberg is non-compliant with fire and building codes, which are alleged in the PAC, namely: (a) having rubber tiles in his terrace that don't meet fire code; (b) using rubber tubing to supply gas to his barbeque grill; and (c) having illegal sized aluminum awnings and trellises on his terrace. (PAC ¶ 96). Defendant does not deny these facts. While the proscription against rubber tubing and aluminum awnings are prohibited by the Roof/Terrace Standards. Greenberg's non-compliance also creates potential liability to the corporation. Defendant openly admits the purpose of the Roof/Terrace Standards is to protect against "high wind events" but gut most of the provisions related to these events for Greenberg. Defendant's duty to the regulators to have all shareholders comply with New York City building safety codes is independent of its duty to treat all shareholders equally under the Lease. See Abrams v. Donati, 66 N.Y.2d 951 (1985).

Defendant also argues that the derivative claim fails because of failure to allege with particularity his demand to the board, and that BCL § 501 does not give rise to actions alleged by Musey, citing the case Moltisanti v. East River Housing Corp., 149 A.D.3d 530 (1st Dep't 2017). In the PAC, Musey alleged that he made demands to the board to "compel Greenberg to correct the dangerous conditions on his Terrace." (PAC ¶ 94). In the Musey Affidavit, he attached Exhibit C in which he asked the board "when [Greenberg] will be similarly required to conduct such a construction project [referring to the terrace]." He also attached Exhibit D, dated October 25, 2018,

which is the board's response to his demand. The board simply stated: "The Co-op treats all shareholders equally. To the extent there are issues with the Greenbergs' compliance with Terrace Standards and/or applicable Building and Fire Codes, they are being dealt with between the Board and its representatives and the Greenbergs and their representatives." Musey realized that, after five years, the board is still unwilling to compel Greenberg[11] and therefore initiated the filing of the PAC.

CONCLUSION

Based upon the foregoing and the moving papers, Plaintiff respectfully requests an order granting his application for leave to file an amended complaint.

Dated: Purchase, New York
February 26, 2019

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[11] Or do the necessary work and invoice Greenberg as permitted in the proprietary lease.