Konigsberg v 333 E. 46th St. Apt. Corp.
2016 NY Slip Op 31180(U)
June 21, 2016
Supreme Court, New York County
Docket Number: 158739/15
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 2

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JOEL KONIGSBERG and JANE GOLDMAN,

Plaintiffs,

Index No. 158739/15

-against-

333 EAST 46TH ST. APARTMENT CORP.,

DECISION & ORDER
Mot. Seq. No. 001

Defendant.

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KATHRYN FREED, J.

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1,2,3
NOTICE OF CROSS MOTION AND AFFIDAVITS ANNEXED	4,5,6
PLAINTIFFS' REPLY AFFIDAVIT	7
MEMORANDA OF LAW	8,9
PLAINTIFFS' REPLY MEMORANDUM OF LAW	10

UPON THE FOREGOING CITED PAPERS, THIS DECISION ON THE MOTION IS AS FOLLOWS:

Plaintiffs Joel Konigsberg (Konigsberg) and Jane Goldman (together, plaintiffs) move, pursuant to CPLR 3212, for summary judgment on their complaint for, among other things, a declaratory judgment that defendant 333 East 46th St. Apartment Corp.'s (the Coop) revocation of its consent to allow plaintiffs to have a washer/dryer in their apartment is improper. Plaintiffs also seek an injunction restraining the Coop from preventing plaintiffs from replacing their washer/dryer, which had been destroyed in a fire.

The Coop cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the first through fourth causes of action in the complaint and for a declaration that plaintiffs are not entitled to install a washer/dryer in their apartment.

FACTUAL BACKGROUND:

Plaintiffs are the owners of apartments 5H, 6H, and 6J in the Coop. In 1994, plaintiffs performed an alteration to combine apartments 6J and 6H. The alteration included the removal of the kitchen in apartment 6J and the installation of a washer/dryer in the former kitchen area. In a May 21, 1994 letter, the Coop approved the planned 1994 alterations, subject to certain conditions specified in the alteration agreement (the 1994 Agreement) (Konigsberg aff., exhibit C). Paragraph 14 of the Agreement stated, in pertinent part:

> "[s]pecifically, the Board Approval [sic] has agreed to your installing a clothes washer and making certain plumbing changes in connection therewith. If after such installation the operation of your clothes washer causes stoppages, backups and/or any other type of malfunction in the plumbing lines which the clothes washer is utilizing, the Owner of the building will give you notice thereof and a reasonable opportunity to correct the same. If such matter(s) cannot be cured or are not cured within a reasonable period of time, the Owner shall have the right to require you to remove the clothes washer"

(*id.*).

In 2004, plaintiffs performed an alteration to combine apartment 5H with apartments 6H/6J. That alteration included creation of an opening in the floor/ceiling slab between apartments 5H and 6H and the installation of a convenience stairway (*id.*, ¶ 6).

In 2012, while Konigsberg was a member of the Coop's board of directors, the board voted to amend the House Rules, which previously had permitted installation of washer/dryers. The house rule now provides: "[t]he installation within apartments of clothes washers, clothes drying machines . . . is prohibited without the prior written approval of the Corporation" (Mustafa aff, exhibit B, "House Rule E5"). The house rules are incorporated into, and are made a part of the proprietary lease (Konigsberg aff, exhibit A, ¶ 13).

Thereafter, in December 2014, a contractor hired by the Coop was performing concrete work in the Coop's basement when it hit an electrical line, causing an electrical surge and damage throughout the building, including damage to the elevators and electrical lines in the J line apartments and outages of stoves in the B line apartments. According to Konigsberg, the surge also caused fires in at least three locations in the Coop – the basement, garage, and in the laundry room of apartment 6H behind the washer/dryer unit (*id.*, ¶¶ 8, 9, exhibit I).

Konigsberg alleges that the fire rendered apartments 6 H & 6 J untenantable from December 2014 through March 2015, and that, pursuant to paragraph 4 (b) of the proprietary lease, the Coop was obligated to proportionally abate the maintenance for the apartments during that period (*id.*, exhibit A).[1]

Shortly after the fire, plaintiffs removed the damaged washer/dryer and began restoring their apartment. Although the Coop consented to the restoration of the

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[1]Paragraph 4 (b) of the proprietary lease provides, "[i]n case the damage resulting from fire . . . shall be so extensive as to render the apartment partly or wholly untenantable . . . the rent hereunder shall proportionately abate until the apartment shall again be rendered wholly tenantable . . . ."

apartment, it informed plaintiffs that they would not be permitted to replace the washer/dryer (Lefkowitz aff., exhibit G).

In August 2015, after a period of negotiation between the parties, the Coop notified plaintiffs that it had authorized the installation of a washing machine, "once . . . inspection on staircase/electric (to assure structural integrity of building not compromised)" (Konigsberg aff, exhibits G, H). Plaintiffs have refused to permit the Coop to inspect their apartment on the ground that the Coop does not have a bona fide basis for such inspection under the proprietary lease.[2]

Regarding the maintenance abatement, in July 2015, the Coop's attorney notified plaintiffs that the Coop's insurance company was prepared to offer them a reasonable abatement but that the time period for the abatement had to be resolved (*id.*, exhibit L).

Plaintiffs commenced this action in August 2015, seeking: 1) a declaratory judgment that the Coop improperly revoked its consent to permit plaintiffs to install a washer/dryer and that plaintiffs are legally permitted to replace their washer/dryer; 2) an injunction restraining the Coop from preventing plaintiffs from replacing their washer/dryer; 3) a declaratory judgment that the Coop has not established a valid basis to inspect their apartment; and 4) an injunction restraining the Coop from accessing plaintiffs' apartment. In addition, the complaint states a fifth cause of action for breach

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[2] Paragraph 25 (a) of the proprietary lease provides, "[t]he Lessor and its agents and their authorized workmen shall be permitted to visit, examine, or enter the apartment . . . at any reasonable hour of the day upon notice, or at any time without notice in case of emergency, to make or facilitate repairs in any part of the building or to cure any default of the Lessee . . .". (*id.*, exhibit A).

of the lease on the ground that the Coop failed to repair the apartment, failed to abate the maintenance, and that it improperly charged plaintiffs for the Coop's attorneys' fees.

THE PARTIES' CONTENTIONS:

In support of their motion for summary judgment, plaintiffs argue that the Coop's recission of its permission for the installation of the washer/dryer under the 1994 Agreement constitutes a breach of that agreement because the Coop never notified plaintiffs that the washer/dryer adversely affected the building's plumbing or interfered with the Coop in any way. They assert that the business judgment rule is not controlling here because the Coop's revocation of its consent was discriminatory, not for a bona fide purpose, and in bad faith, and that, when the Coop did agree to permit the installation, it conditioned the installation on an inspection that was completely unrelated to the washer/dryer. Plaintiffs also claim that an injunction is necessary because they have no remedy at law, irreparable injury will result if the injunction is not granted, and the equities lie in their favor.

In addition, plaintiffs contend that the Coop breached the proprietary lease by failing to grant a maintenance abatement pursuant to paragraph 4 (b) of the lease. They also argue that the Coop breached the lease by improperly assessing attorneys' fees against them because the proprietary lease only requires a lessee to pay the Coop's attorneys' fees if the lessee is in default under the lease.

Plaintiffs further maintain that, pursuant to paragraph 25 (a) of the lease, they are entitled to a declaration that the Coop has no legal basis to enter their apartment and that they are entitled to an injunction restraining the Coop from entering the apartment

because the Coop is not seeking to enter to make or facilitate repairs in any part of the building or to cure plaintiffs' default.

In opposition to plaintiffs' motion for summary judgment and in support of their cross motion for summary judgment dismissing the first through fourth causes of action in the complaint and for a declaration that plaintiffs are not entitled to install a washer/dryer in their apartment, the Coop contends that the complaint is barred by the four-month statute of limitations governing Article 78 proceedings.

Alternatively, the Coop argues that the business judgment rule protects the Coop's decision because the 2012 rule regarding washer/dryers was adopted for the common and general interests of the corporation.

Regarding its right to inspect the apartment, the Coop takes the position that the condition of the property has been put in issue in this lawsuit and, pursuant to CPLR 3120 (1) (ii), defendant has a right to inspect the property.

Finally, the Coop argues that there are questions of fact as to: 1) the cause of the fire in plaintiffs' apartment; 2) whether the apartment was untenantable and, if so, for what period of time, and 3) whether plaintiffs are in default under the lease.

LEGAL CONCLUSIONS:

Summary judgment will be granted if it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The burden is on the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary

proof sufficient to establish the existence of a triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion (*Zuckerman v City of New York*, 49 NY2d at 562; *see also Ellen v Lauer*, 210 AD2d 87, 90 [1st Dept 1994][it "is not enough that the party opposing summary judgment insinuate that there might be some question with respect to a material fact in the case. Rather, it is imperative that the party demonstrate, by evidence in admissible form, that an issue of fact exists . . ."]).

A. Statute of Limitations

The branch of the cross motion that seeks summary judgment dismissing the first through fourth causes of action on the ground that they are barred under the four-month statute of limitations associated with Article 78 proceedings is denied because the Coop has failed to make a prima facie showing that it is entitled to judgment dismissing those causes of action on statute of limitations grounds.

Here, plaintiffs do not allege that the Coop was acting in violation of its own governing documents, which would subject them to the four-month statute of limitations associated with Article 78 proceedings (*see e.g. Katz v Third Colony Corp.*, 101 AD3d 652, 653 [1st Dept 2012] [allegations that defendant cooperative acted beyond the powers granted to them in the cooperative's governing documents are governed by the four month statute of limitations for an Article 78 proceeding]; *see also Buttitta v Greenwich House Coop. Apts., Inc.*, 11 AD3d 250 [1st Dept 2004]).

Rather, the first and second causes of action allege that the Coop breached the 1994 Agreement by not allowing them to replace their washer/dryer. These allegations are governed by the six-year breach of contract statute of limitations. In *Whalen v 50 Sutton Place S. Owners*, 276 AD2d 356, 357 (1st Dept 2000), the First Department ruled that, where plaintiffs sought to enforce specific rights granted to them under an alteration agreement which had been approved by the cooperative, plaintiffs' claim against the cooperative was for breach of contract.

In the matter before this Court, plaintiffs submit evidence that the Coop's alleged breach of the 1994 agreement occurred on April 29, 2015 when the cooperative notified them, in writing, that it would not permit them to install a washer/dryer. In response, the Coop has produced an email, dated February 12, 2015, which appears to have been sent to Konigsberg and others, advising Konigsberg that he would not be permitted to install a washer/dryer. However, even if February 12, 2015 were the date plaintiffs were notified of the Coop's decision, the first and second causes of action were commenced well within the six-year statute of limitations for breach of contract.[3]

The third and fourth causes of action allege breaches of the proprietary lease which are also are governed by the six-year statute of limitations for breach of contract. Recently, in *Estate of Del Terzo v 33 Fifth Ave. Owners Corp.*, 136 AD3d 486, 488 (1st Dept 2016), the First Department definitively stated that an action for breach of the proprietary lease is timely commenced within six years of the cooperative's breach. Accordingly, the third and fourth causes of action have also been timely commenced

[3] It is undisputed that this action was commenced in August 2015.

because plaintiffs' claim for a maintenance abatement under the proprietary lease could not have accrued before December 12, 2012, the date of the fire.

B. Washer/Dryer

Plaintiffs have made a prima facie showing that they are entitled to summary judgment on their first and second causes of action which seek a declaration that they are entitled to replace their washer/dryer and an injunction restraining the Coop from preventing such replacement. They have established their entitlement to such relief by submitting a copy of the 1994 alteration Agreement approved by the board, which provides that the Coop was obligated to give plaintiffs notice if the operation of the washer/dryer was causing problems with the plumbing lines and that removal of the washer would only be required if plaintiffs were unable or failed to cure such problems. Plaintiffs also submit a copy of the proprietary lease which states, at paragraph 18 (c), that, promptly, on notice from the Coop, plaintiffs are required to remedy any problems in the building caused by their equipment or appliances.

Plaintiffs aver, and the Coop does not deny, that the Coop never advised plaintiffs that their washer/dryer caused any malfunction with the plumbing lines or other systems in the building.

However, the business judgment rule prohibits judicial inquiry into the actions of the board. It is well settled that the business judgment rule protects the actions of a board of directors of a cooperative corporation so long as the board acts for the purposes of the cooperative, within the scope of its authority, and in good faith (*see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-538 [1990]). "In

determining whether the board . . . unreasonably withheld its consent . . . it is the business judgment rule, not the court's independent assessment of the reasonableness of the decision, that provides the proper standard of review" (*Barbour v Knecht*, 296 AD2d 218, 224 [1st Dept 2002]).

The Coop has submitted a copy of the proprietary lease which incorporates a set of house rules and grants the board the authority to "alter, amend or repeal such House Rules and adopt new House Rules" (Lefkowitz aff, exhibit B, ¶ 13). The shareholders covenant that they will comply with the house rules and see that they are faithfully observed (*id.*). In addition, the lease contains a non-waiver provision (*id.*, ¶ 26).

In *Horowitz v 1025 Fifth Ave., Inc.*, 7 AD3d 461, 462 (1st Department 2004), the plaintiffs had an awning on the terrace of their apartment that was allowed when they purchased their apartment. However, several years later, the board adopted a house rule prohibiting awnings. In connection with some renovations, the board, citing the house rule, required the plaintiffs to remove the awning and the plaintiffs commenced an action seeking a declaration that they could maintain the awning and an injunction prohibiting the cooperative from removing it. The cooperative moved for summary judgment dismissing the complaint. The motion court denied the cooperative's motion and granted the plaintiffs injunctive relief. In reversing the motion court, the First Department stated,

> "We perceive no basis for Supreme Court's interference in the management prerogative of the cooperative's board of directors. Irrespective of whether the [sic] it was permissible at the time it was installed, the cooperative's house rules presently prohibit the awning, and the cooperative's right to require its removal is preserved by the nonwaiver provision in the proprietary lease. The rule prohibiting awnings is applicable to the tenants generally and furthers no discriminatory purpose that would overcome the presumption that the directors exercised their

> honest judgment to promote the lawful and legitimate interests of the corporation"

(internal citations omitted).

In *Cannon Point N. v Abeles,* 160 Misc 2d 30 (App Term, First Dept 1993), the defendant challenged the cooperative's house rule prohibiting installation of washers and dryers in the individual apartments. In that case, the court held that the house rule was a legitimate exercise of the board's authority and that the rule was adopted in good faith because the record revealed that the rule was promulgated on account of legitimate concerns that the washer/dryers could adversely affect the cooperative's plumbing and electrical systems. The court also found that the defense of waiver was unavailing because the proprietary lease contained a comprehensive nonwaiver clause. There, as here, the proprietary leases stated that, "the board at any time could 'alter, amend and repeal' the house rules, and it cannot be reasonably argued that respondents had somehow acquired vested rights in the continued maintenance of these machines" (*id.* at 32).

In this case, it is undisputed that, prior to 2012, the Coop permitted shareholders to install washer/dryers in their individual apartments. However, the new rule restricting washer/dryers was adopted because of the board's concern that the plumbing in the building was quite old and the use of the washing machines could create problems with the pipes throughout the building, resulting in the need for extensive repairs (Moustafa aff., ¶¶ 5, 6). Indeed, Koenigsberg was a member of the board in 2012, when the restriction on washer/dryers was being discussed, and he voted in favor of the new house

rule (*id.*, ¶¶ 7, 8 and exhibit A). Since 2012, the board has denied the applications of all 11 shareholders who have requested permission to install washer/dryers.

Here, as in *Horowitz* and *Cannon Point North*, the proprietary lease permits the board to amend, alter or repeal the house rules. In addition, the proprietary lease contains a nonwaiver clause.[4] Moreover, Konigsberg does not deny that the 2012 house rule restricting washer/dryers was adopted because of the board's concern regarding the stress that washer/dryers put on the building's aging plumbing system and that, since the 2012 rule was adopted, all of the shareholder requests for washer/dryers have been denied. In this instance, plaintiffs "have failed to establish that the board was not acting for the purposes of the cooperative, within the scope of its authority and in good faith." *Rubinstein v 242 Apt. Corp.*, 189 AD2d 685, 686 (1st Dept 1993) citing *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d at 538; *see also Finegan Family, LLC v 77 Horatio St. Condominium,* 38 AD3d 365, 366 (1st Dept 2007). Plaintiffs' conclusory assertion that the Cooperative's actions were based on a personal vendetta and were taken in bad faith are insufficient to raise a question of fact (*see e.g. Roth v Beth Israel Med. Ctr.*, 180 AD2d 434, 435 (1st Dept 1992).

The fact that plaintiffs were allowed to keep a previously approved washer/dryer for 20 years before the new house rule was adopted, does not prevent the board from enforcing the new house rule when plaintiffs sought to install new appliances. "Pursuant

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[4] Paragraph 26 of the Proprietary Lease, titled "Waivers" states, "[t]he failure of the Lessor to insist, in any one or more instances, upon a strict performance of any one of the provisions of this lease, or to exercise any right or option herein contained, or to serve any notice, . . . shall not be construed as a waiver or relinquishment for the future, of any such provision, options or rights, but such provisison, option or right shall continue and remain in full force and effect" (Konigsberg aff, exhibit A).

to the proprietary leases, the board at any time could 'alter, amend and repeal' the house rules, and it cannot be reasonably argued that respondents had somehow acquired vested rights in the continued maintenance of these machines." *Cannon Point N., Inc. v Abeles*, 160 Misc 2d at 32.

Accordingly, the branch of plaintiffs' motion seeking a declaration that the board's revocation of its consent to plaintiffs' washer/dryer was improper, and for an injunction restraining the board from preventing plaintiffs from replacing their washer/dryer is denied, and the branch of the Coop's motion for summary judgment dismissing the first and second causes of action in the complaint and for a declaration that plaintiffs are not entitled to install a washer/dryer in their apartment is granted.

C. Inspection

House rule, E1, of the 2012 rules provides:

> "The Corporation shall be permitted to visit, examine or enter an apartment and any storage space assigned to a Shareholder at any reasonable hour of the day, upon notice, or at any time without notice in the case of an emergency or to control or exterminate any vermin, insects or other pests"

(Guzman aff, exhibit B)

Paragraph 13 of the proprietary lease states that the "lease shall be in all respects subject to such house rules which, when a copy thereof has been furnished to the Lessee, shall be taken to be part hereof and the Lessee covenants to comply with all such House Rules . . . . Breach of a House Rule shall be a default under this lease" (*id.*). Thus, pursuant to the lease and the house rules incorporated therein, the cooperative has, not only a specific right to enter an apartment, on notice, to make a repair or cure a default

(Konigsberg aff, exhibit A, ¶ 25 [a]), but also a general right to inspect a lessee's apartment, at any reasonable hour, with notice to the lessee. This general inspection is permitted whether or not the cooperative is required to do so in order to make repairs or cure the lessee's default pursuant to paragraph 25 of the proprietary lease.

Although plaintiffs argue that they are entitled to an order restraining the Coop from entering the apartment because they are not in default, the clear language of the house rule, which has been incorporated into the proprietary lease, reveals that the Coop has a general right to enter and inspect.

Accordingly, the branch of plaintiffs motion requesting a declaration that the Coop has not established a valid basis to access and inspect the apartment and for an injunction restraining the board from accessing the apartment is denied and the branch of the Coop's motion that seeks dismissal of the third and fourth causes of action is granted.

Moreover, pursuant to house rule E1 and paragraph 13 of the proprietary lease, plaintiffs' refusal to allow the Coop to inspect the apartment is a default under the proprietary lease and, pursuant to paragraph 28 of the proprietary lease,[5] plaintiffs are liable for the attorneys' fees that the Coop incurred in attempting to cure the default. However, because the Coop has failed to submit any evidence to substantiate either the

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[5] Paragraph 28 of the proprietary lease provides:

> "If the Lessee shall at any time be in default hereunder and the Lessor shall incur any expense (whether paid or not) in performing acts which the Lessee is required to perform, or in instituting any action or proceeding based on such default, or defending, or asserting a counter-claim in, any action or proceeding brought by Lessee, the expense thereof to the Lessor, including reasonable attorneys' fees and disbursements, shall be paid by the Lessee to the Lessor, on demand, as additional rent.

$631.48 assessment or the $1,375 assessment of attorneys' fees charged to plaintiffs, judgment on the amount of fees the Coop incurred is held in abeyance pending submission of such evidence at the conclusion of this matter.

D. Breach of the Lease

Paragraph 4 of the proprietary lease addresses the duty of the Coop when a fire in the building is determined to be covered by the Coop's multi-peril insurance policies. If it is determined that the fire is covered by such policy, then subparagraph 4 (b) requires the Coop to proportionally abate the maintenance of an apartment for the length of time that a lessee's apartment is rendered wholly or partially untenantable as a result of the fire.

Here, plaintiffs have failed to establish a prima facie case that they are entitled judgment on their claim that the Coop breached the lease by failing to abate the maintenance fees during the time that the apartment was allegedly untenantable. Although plaintiffs have submitted an affidavit from a fire investigator retained by plaintiffs' insurance carrier, wherein he opines that the fire in plaintiffs' apartment was caused by the Coop's contractor, the Coop correctly contends that, at this pre-discovery stage of the litigation, there are questions of fact regarding the cause of the fire and whether the washer/dryer was properly grounded. Discovery including, but not limited to, the Coop's inspection of the washer/dryer, which is currently being stored in an evidence facility, is necessary so that the Coop can adequately respond to plaintiffs' claim for a maintenance abatement. *See*, CPLR 3212 (f); *see e.g. Abrams v Pecile*, 115 AD3d 565 (1st Dept 2014); *Baldasano v Bank of N.Y.*, 199 AD2d 184, 185 (1st Dept

1993); *Board of Managers of Empire Condominium v Atwood*, 2014 WL 1980294, 2014 NY Slip Op 31279(U) *7, 8 (Sup Ct, NY County 2014).

Moreover, plaintiffs have failed to submit any evidence demonstrating that the apartment was untenantable as a result of the fire and, if it was, evidence of the length of time that they were unable to live in the apartment. Konigsberg's self-serving affidavit, without more, is an insufficient basis for summary judgment on the breach of contract claim. *See e.g. Agai v Diontech Consulting, Inc.*, 40 Misc 3d 1229(A), 2013 NY Slip Op 51345(U) (Sup Ct, Richmond County 2013) *affd* 138 AD3d 736, 737 (2d Dept 2016) (plaintiffs self serving affidavits "failed to demonstrate their prima facie entitlement to judgment as a matter of law").

Plaintiffs request for attorneys' fees is denied, with leave to renew, if it is determined that the Coop breached the lease by failing to abate plaintiffs' maintenance.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of plaintiffs Joel Konigsberg and Jane Goldman's motion for summary judgment that seeks judgment in their favor on the first, second, third, and fourth causes of action in the complaint is denied; and it is further

ORDERED that defendant 333 East 46th St. Apartment Corp.'s cross motion for summary judgment dismissing the first, second, third and fourth causes of action in the complaint is granted; and it is further

ORDERED that plaintiffs are liable to defendant 333 East 46th St. Apartment Corp. for the amount of a $631.48 assessment and $1,375 in attorneys' fees, and defendant reserves it s right to introduce evidence of these damages at the time of trial; and it is further

ORDERED that the branch of defendant's motion which seeks a declaratory judgment that plaintiffs are not entitled to install a washer/dryer in their apartments is granted; and it is further

ADJUDGED and DECLARED that plaintiffs are not entitled to install a washer/dryer in their apartments; and it is further

ORDERED that the branch of plaintiffs' motion that seeks summary judgment on the fifth cause of action is denied; and it is further

ORDERED that the fifth cause of action is severed and shall continue; and it is further

ORDERED that the parties are directed to appear for a preliminary conference in Room 280 at 80 Centre Street, New York, New York on July 19, 2016 at 2:30 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: June 21, 2016

ENTER:

KATHRYN E. FREED, J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT