Huyck v 171 Tenants Corp.

2018 NY Slip Op 33026(U)

November 19, 2018

Supreme Court, New York County

Docket Number: 653181/2017

Judge: Robert D. Kalish

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT D. KALISH** **PART** **IAS MOTION 29EFM**

Justice

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MARY HUYCK and PHILIP HUYCK,

Plaintiffs,

- v -

171 TENANTS CORP.,

Defendant.

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INDEX NO. 653181/2017

MOTION DATE 10/30/2018

MOTION SEQ. NO. 004

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 004) 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211

were read on this motion to/for SUMMARY JUDGMENT.

Motion for summary judgment, pursuant to CPLR 3212, by Plaintiffs Philip Huyck and Mary Huyck, seeking an order: (1) awarding them declaratory judgment determining that they have "sole and exclusive use of the entire Terrace surrounding the Penthouse Apartment C, Apartment 162, located at 171 East 79th Street, New York"; (2) awarding them summary judgment as to liability on all attorney's fees, costs and disbursements incurred by the Plaintiffs in this action pursuant to paragraph 28 of the Proprietary Lease, which will be ultimately determined at a legal fee inquest to be scheduled by the Court; and (3) dismissing and/or striking the eight affirmative defenses raised in the Defendant's Answer, along with such other relief as this Court deems just and proper in the circumstances. Defendant opposes the motion. The motion is granted for the reasons stated herein.

BACKGROUND

Plaintiff Philip Huyck and Mary Huyck are the owners of stock certificates and proprietary tenants/lessees under a proprietary lease (the "proprietary lease") for the cooperative apartment known as Penthouse C/PH2, Apartment 162 (the "apartment" or "PH2"), in the building located at 171 West 79th Street, New York, NY (the "building").

Defendant 171 Tenants Corp. is a cooperative housing corporation (the "cooperative" or "Defendant"), which owns the building, having issued stock certificates and shares in the cooperative to the building's residents, and which is the lessor for all proprietary leases for the resident shareholders of the building.

The issue in this case and on this motion is whether Plaintiffs have exclusive use of a portion of the rooftop on the northern half of Defendant's cooperative building (the "northern rooftop" or the "subject rooftop"), where Plaintiffs have a penthouse apartment that opens onto said rooftop space, or whether the space, or at least some of the space, is available for use by all tenants in the cooperative building.

From a bird's eye view, the building's entire rooftop is shaped like the capital letter "H", with the two long lines of the "H" being on the northern and southern sides of the building. (See Affirm in Supp., Ex. E [Satellite Photos of Rooftop].) As described in the papers, there is thus a northern rooftop and a southern rooftop. The small line of the "H" that sits between the northern and southern rooftops is occupied by Plaintiffs' penthouse apartment on the northern half and other penthouse apartments on southern half. All of the penthouses stick out and occupy portions of their respective northern and southern rooftops. There is no other apartment sitting on the northern half of the building's roof space, and the only other way to access the northern rooftop—other than through Plaintiffs' apartment—is through an alarmed door containing a "panic bar" with a sign stating "EMERGENCY EXIT ONLY[.] ALARM WILL SOUND. PUSH HERE." (See Affirm in Supp. Ex. N [Photo of Door with Panic Bar].)

Plaintiffs purchased their penthouse apartment in 1999 and have occupied said penthouse as part-time residents since. Plaintiffs were prompted to view the apartment after seeing it advertised in the New York Times, where it was described as having a "Huge Terrace."

Plaintiffs further state that, after closing on the apartment, they spent roughly $100,000 to renovate the rooftop in 1999, and that those renovations were performed pursuant to a 1999 Renovation Agreement between themselves and Defendant. Pursuant to 1999 Renovation Agreement, the following renovations took place:

- a "decorative decking surface" was installed;

- "a retaining fence of sufficient height and construction to comply with local, state and other applicable building codes" was installed all along the parapet walls;
- a steel roof access door "that meets all relevant code specifications for roof access barriers … for the access between the west staircase and the roof, on which shall be installed a standard 'panic bar' 'Detex' alarm device" was installed.[1]

(Affirm in Supp., Ex. M [1999 Renovation Agreement].)

For certain periods, Plaintiffs' children and their son-in-law lived in the penthouse full-time. Plaintiffs submit affidavits from themselves and their children stating, in sum and substance, that they have always believed that they were entitled to exclusive use of the rooftop space adjoining their property.[2] These affidavits further state that, in their experience, other tenants have rarely come up to the rooftop space without receiving their permission to do so in advance; and that in those rare instances of other tenants coming onto the roof without their permission, Plaintiffs and their family have either confronted those tenants and asked them to leave or informed those tenants that they could remain on the rooftop.

Discussions between Plaintiffs and Defendant—namely through cooperative board president Elliot Gibber—concerning Plaintiffs' neighbors accessing the subject rooftop go back to at least 2004. These discussions included the parties talking about ways to potentially allow Plaintiffs' neighbors to access a portion of the rooftop while addressing Plaintiffs' concerns about their security and privacy—such as building a privacy fence.

Notwithstanding Plaintiffs' affidavits stating that, in their experience, the subject rooftop is rarely used by their neighbors, Defendant submits twelve (12) affidavits from residents in the building stating that they have used the subject rooftop with varying degrees of frequency. Defendant, however, does not dispute

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[1] The 1999 Renovation agreement stated that the cost of "the panic bar Detex device" was "only to be borne by the Co-op." (1999 Renovation Agreement.)

[2] According to the affidavits, Plaintiffs' son Peter Huyck lived in PH2 briefly in 1999 before the renovations to the rooftop occurred. After renovations were completed in 2000, Plaintiffs' daughter Laura Redican occupied the apartment full-time until 2006. From 2006 to 2007, Laura's husband lived in the apartment full time, and Laura frequently visited him. Laura, her husband, and daughter lived in PH2 full-time from autumn 2009 through 2010. Since 2010, PH2 has apparently been used only for part-time living by Plaintiffs and their family.

that the subject rooftop can only be accessed by these other residents through an alarmed door containing a "panic bar" with a sign stating "EMERGENCY EXIT ONLY[.] ALARM WILL SOUND. PUSH HERE."[3] In order to access the rooftop, Defendant would require the other residents to obtain a key from the doorman (which would presumably disengage the alarm), and the doorman would "buzz" Plaintiffs' penthouse apartment to advise that these residents wanted to use the rooftop.

One of these doormen, who testified at the hearing on Plaintiffs' motion for a preliminary injunction, stated that since 1999, he "spoke to somebody" in Plaintiffs' penthouse "maybe 10" times via intercom about residents requesting to access the roof, and that "[m]aybe on a couple times [Plainiffs' daughter would] say give me some time, give me a few minutes. And then they will call back and say it is okay." (Affirm in Supp. Ex. D-2 [July 19, 2017 Tr. of PI Hearing] at 279:06-292:21.) This doorman testified that if no one answered his buzz, he would give the key to the requesting resident. This doorman further testified that he was instructed by his superintendent to buzz the apartment before giving out the key, and that, as he understood it, he was not seeking permission from Plaintiff's daughter for the resident to use the roof but rather that he was letting Plaintiff's daughter know that someone would be coming up to "[m]aintain [her] privacy." (Id.)

This apparent status quo of other tenants being given access to the subject rooftop—with no one being present in Plaintiffs' penthouse or upon informing someone in Plaintiffs' penthouse on "maybe 10" occasions—seems to have continued until the last few years. That status quo apparently changed in 2016, when Defendant placed a table on the subject rooftop. The dispute then escalated significantly in the spring of 2017, when the Japanese Rock garden[4] on the subject roof was destroyed, and Mr. Gibber, as the coop board president, informed Mr. Huyck that "[a]t this time the board wants the entire roof community property." (Affirm. in Supp., Ex. V [May 12, 2017 Email from Gibber].)

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[3] Defendant, however, submits an affidavit from a licensed architect stating that, in his professional opinion, "the presence of the alarmed exit control device on the door leading to the roof of the Building does not indicate that the doorway is meant to be used solely in emergencies." (Wainer Aff. ¶ 9 [emphasis in original].) That a door may potentially be used in contravention of how a sign publicly states it should be used is not a proposition that requires testimony from an expert, and this Court finds that this affidavit is irrelevant to the issue presented by this motion.

[4] The Japanese rock garden was installed by Plaintiffs with the permission of Defendant at the time of the 1999 Renovation.

Plaintiffs filed the instant complaint on June 9, 2017. In July 2017, after hearing three days of testimony, Judge Bluth issued a preliminary injunction holding that:

- Defendant was to erect a temporary and removable barrier on part of the on the roof as shown in a diagram annexed to the order;
- The other residents in the building could use a portion of the subject roof in the northwest corner (as shown in the diagram) "only when the Huycks are not in residence"; and
- That Defendant "may place the teak table, chairs and umbrella which were previously on the roof deck in 2016" on in the northwest corner of the roof.

(Affirm in Supp., Ex. Z [Preliminary Injunction Order].)

On the last day of the hearing, Judge Bluth explained that this order was necessary to maintain the status quo and that Her Honor found that "[t]here is a likelihood of success on the merits that the Huycks will be found to have exclusive use of at least a part of the roof or the deck, and there is very little likelihood that the board will prevail in its position that it's entitled to the whole roof. (PI Hearing Tr. at 531:07-11.)

DISCUSSION

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted].) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

I. The Proprietary Lease in the Context of the *Rose* Case

In the instant case, Plaintiffs put forward the proprietary lease with the following provision entitled "Penthouses, Terrace and Balconies":

> "If the apartment includes a terrace, balcony, or a portion of the roof adjoining a penthouse, the Lessee shall have and enjoy the exclusive use of the terrace or balcony or that portion of the roof appurtenant to the penthouse, subject to the applicable provisions of this lease and to the use of the terrace, balcony or roof by the Lessor to the extent herein permitted. The Lessee's use thereof shall be subject to such regulations as may, from time to time, be prescribed by the Directors. The Lessor shall have the right to erect equipment on the roof, including radio and television aerials and antennas; for its use and the use of the lessees in the building and shall have the right of access thereto for such installations and for the repair thereof. The Lessee shall keep the terrace, balcony, or portion of the roof appurtenant to his apartment clean and free from snow, ice, leaves and other debris and shall maintain all screens and drain boxes in good condition. No planting, fences, structure or lattices shall be erected or installed on the terraces, balconies, or roof of the building without the prior written approval of the Lessor. No cooking shall be permitted on any terraces, balconies or the roof of the building, nor shall the walls thereof be painted by the Lessee without the prior written approval of the Lessor. Any planting or other structures erected by the Lessee or his predecessor in interest may be removed and restored by the Lessor at the expense of the Lessee for the purpose of repairs, upkeep or maintenance of the building."

(Affirm in Supp., Ex. L [Proprietary Lease] ¶ 7.)

With the exception of second paragraph to follow, the above provision is virtually identical to the following provision by the same title in the case of *Rose v 115 Tenants Corp.*, (150 AD3d 472 [1st Dept 2017]):

> "If the apartment includes a yard, terrace, balcony, or a portion of the roof adjoining a penthouse, the Lessee shall have and enjoy the exclusive use of the yard, terrace or balcony or, that portion of the roof appurtenant to the penthouse, subject to the applicable provisions of this lease and to the use of the yard, terrace, balcony or roof by the Lessor to the extent herein permitted. The Lessee's use thereof shall be subject to such regulations as may, from time to time, be prescribed by the Directors. The Lessor shall

> have the right to erect equipment on the roof, including radio and television aerials and antennas, for its use and the use of the lessees in the building and shall have the right to access thereto for such installations and for the repair thereof. The Lessee shall keep the yard, terrace, balcony, or portion of the roof appurtenant to his apartment clean and free from snow, ice, leaves and other debris and shall maintain all screens and drain boxes in good condition. No planting, fences, structures or lattices shall be erected or installed on the yard, terraces, balconies, or roof of the building without the prior written approval of the Lessor. No cooking shall be permitted in or on any yards, terraces, balconies or the roof of the building, nor shall the walls thereof be painted by the Lessee without the prior written approval of the Lessor. Any planting or other structures erected by the Lessee or his predecessor in interest may be removed and restored by the Lessor at the expense of the Lessee for the purpose of repairs, upkeep or maintenance of the building.
>
> Where a terrace is located directly above a part of another apartment, there shall be no use on the terrace of bicycles, skates, playground or similar equipment. The Lessee of the apartment to which the terraces are appurtenant shall cover the terrace with 'indoor-outdoor' carpeting or 'astro-turf ', or a similar material, within 10 days after entering into occupancy of the apartment, and he shall maintain the same and replace it when necessary."

(*Rose* Proprietary Lease ¶ 7 [obtained via SCROLL].)

In the *Rose* case, the cooperative defendants wanted to construct a sun deck that would be available to all shareholders on a portion of the building's rooftop adjoining the *Rose* plaintiffs' penthouse apartment. The *Rose* plaintiffs ("the Roses") moved for summary judgment requesting an order declaring that they were entitled to exclusive use of the roof space adjoining their 242-square-foot studio apartment.

The *Rose* motion court noted that the identical language was construed by the First Department in the case of *Gracie Terrace Apt. Corp. v Goldstone*, (103 AD2d 699, 700 [1st Dept 1984]), as granting to the penthouse tenants, there, the exclusive use of the portion of the roof adjoining their apartment. The *Rose* motion court noted that in *Gracie Terrace* "there were other sections of the roof that were not adjoining, but to which the apartment had access and which the tenants had used exclusively for 10 years. As to those sections of the roof,

questions of fact were presented." (*Rose v 115 Tenants Corp.*, 2016 N.Y. Slip Op. 30314[U], at *3 [Sup Ct, NY County 2016], affd, 150 AD3d 472 [1st Dept 2017].)

Further, as the *Rose* motion court explained, in analyzing the case before it under *Gracie Terrace*, the Roses' proprietary lease's statement that "if the apartment includes a terrace, balcony, or a portion of the roof adjoining a penthouse, the Lessee shall have and enjoy the exclusive use of the terrace or balcony or that portion of the roof appurtenant to the penthouse," meant that "except for the portions of the 1,276 square feet of roof space used for building components, the Lease allocates the roof to the exclusive use of the occupants of PHN." (*Rose v 115 Tenants Corp.*, 2016 N.Y. Slip Op. 30314[U], at *3 [Sup Ct, NY County 2016], affd, 150 AD3d 472 [1st Dept 2017].) This language in the proprietary lease established the Roses' prima facie entitlement to summary judgment, explained the *Rose* motion court. Finding that the defendant cooperative failed to raise a material issue of fact, the *Rose* motion court awarded summary judgment to the Roses.

Recently, another motion court sitting in this county, in *Rushmore v Park Regis Apt. Corp.*, applied *Rose* and *Gracie Terrrace* to a case where two rooftop terraces were at issue: one rooftop space sitting on the roof above the plaintiffs' penthouse unit, and a rooftop space on the same level as and just outside the plaintiffs' penthouse unit. (2018 N.Y. Slip Op. 31335[U], at *3 [Sup Ct, NY County 2018].) The proprietary lease there stated: "[i]f the apartment includes a portion of the roof adjoining a penthouse, the Lessee shall have and enjoy the exclusive use of the terrace or balcony or that portion of the roof appurtenant to the penthouse." (Id. at *3.)

Reading the proprietary lease in the context of *Rose* and *Gracie Terrace*, the *Rushmore* court found that the plaintiff-tenants were entitled to exclusive use of the rooftop space on the same level and just outside of their penthouse apartment, but that they were not entitled to exclusive use of the rooftop space that sat on top of their penthouse. The *Rushmore* court reasoned that "the phrases 'portion of the roof adjoining a penthouse' and 'portion of the roof appurtenant to the penthouse' in the proprietary lease were not intended by the parties to refer to different areas of the roof but only the roof area on same level and just outside the penthouse." (Id. at *9.)

Given that the relevant provision of the instant proprietary lease is virtually identical to the one in *Rose*, and that the language is similar to relevant paragraph in *Rushmore*, this Court finds that Plaintiffs submission of the proprietary lease

establishes Plaintiffs' prima facie entitlement to summary judgment. Similar to *Rose*, Plaintiffs are only claiming exclusive use of the portion of the rooftop on the level of their penthouse and that is appurtenant to their apartment; and that is all the Court is finding they are entitled to: the northern rooftop. "[T]hat portion of the roof appurtenant to the penthouse" must be read to mean the portion of the rooftop space that exists on the same level as the penthouse and which adjoins Plaintiffs' penthouse. The portion does not, for example, encompass the southern rooftop which adjoins other penthouse apartments. Neither does the proprietary lease allow Plaintiffs to exclude Defendant from making specific uses of the roof, for example, "erect[ing] equipment on the roof, including radio and television aerials and antennas"—it only prevents Defendant from making the rooftop "communal space" available for use by other tenants.

Plaintiffs having established their prima facie entitlement to summary judgment, the Court must now analyze whether Defendants raise any material issues of fact requiring denial of summary judgment.

II. Defendant's Attempt to Raise a Material Issue of Fact

A. Defendant's Attempt to Distinguish This Case from *Rose*

Defendant first argues that Plaintiffs have failed to make a prima facie showing that the subject rooftop was meant to be exclusively used by them. This argument is rejected. As the *Rose* court explained, the very language of the proprietary lease establishes by itself that Plaintiffs are prima facie entitled to summary judgment declaring that they have "exclusive use" of the northern rooftop.

Defendants secondly attempt to argue that the configuration of the *Rose* roof is materially different from the instant roof. In the instant case, Plaintiffs submit photographs of the instant roof in comparison to the roof in *Rose* showing that the two are remarkably similar. First, from a bird's eye view, the *Rose* building's entire rooftop space is configured in the same capital letter "H" shape, just like in the instant case. Second, like the instant Plaintiffs, the *Rose* plaintiffs had their penthouse apartment on the northern side of the roof, and there was no other apartment sharing the northern side of the roof with them.[5] At same time, like the

[5] Plaintiffs submit additional photographs with an affirmation from the *Rose* plaintiffs' counsel stating that the attached photographs are true and accurate depictions of the rooftop space at issue in the *Rose* case.

rooftop in the instant case, there was another penthouse apartment on the southern rooftop, and the *Rose* plaintiffs did not claim "exclusive use" of the southern rooftop. In addition, the only way for other tenants to access the Rose rooftop space was through an alarmed, fire door – similar to the one in the instant case.

In addition, Defendants argue that the usage of the roof is different. However, the issue of usage goes to Defendant's affirmative defenses and, accordingly, will be discussed with regard to each relevant affirmative defense.

B. Defendant's Affirmative Defenses

1. Waiver

"A waiver is the voluntary abandonment or relinquishment of a known right. It is essentially a matter of intent which must be proved. [I]t may not be inferred, and certainly not as a matter of law, to frustrate the reasonable expectations of the parties embodied in a lease when they have expressly agreed otherwise." (*Jefpaul Garage Corp. v Presbyt. Hosp. in City of New York*, 61 NY2d 442, 446 [1984].) "A waiver occurs when there is such conduct or failure to act as to evince an intent not to claim the purported advantage." (*Georgetown Unsold Shares, LLC v Ledet*, 130 AD3d 99, 104 [2d Dept 2015].) "Since the very essence of a waiver is the intentional relinquishment of a known right, a waiver cannot be created via negligence, oversight, or thoughtlessness." (Id. at 105.)

a. Usage of the Northern Rooftop by Other Residents

Here, Defendant asserts that Plaintiffs have waived their right to exclusive use because "there is substantial evidence showing that Plaintiffs were aware that the Building's shareholders and residents regularly accessed the Terrace over the course of the last seventeen (17) years since Plaintiffs purchased the Penthouse." (Memo in Opp. at 13.) Defendant submits multiple affidavits from various other tenants in the building stating, in sum and substance, that they often use the subject roof and that they believe it to be "common space" for use by all residents in the building.

However, the record shows that the roof can only be accessed after obtaining a key and the doorman buzzing up to Plaintiff's apartment. Plaintiffs also present evidence that on several occasions they would give permission to specific tenants to use the subject space on the roof, either via the doorman or upon finding them

on the roof. The record also shows that on certain occasions Plaintiffs' family confronted individuals about their using the roof and the individuals left.

In addition, the record also shows that tenants and residents often accessed the rooftop during periods when no one from Plaintiffs' family was living in or using PH2, and that Plaintiffs' family was unaware that these individuals were using the rooftop space. Tellingly, the doorman, who testified at the preliminary injunction hearing, stated that since 1999 he only spoke to someone inside Plaintiffs' apartment on "maybe 10" occasions about other tenants requesting access to the rooftop.

In addition, the record shows significant evidence of Plaintiffs contesting Mr. Gibber's assertions that other tenants should be allowed onto the subject rooftop and asserting that that they were entitled to exclusive use of the subject rooftop space. At the same time, as Plaintiffs' debated their rights under the proprietary lease with Mr. Gibber, they stated that they wanted to be "good neighbors" and to cooperate in finding a solution. Notwithstanding Plaintiffs' statements of wanting to be "good neighbors", Plaintiffs emphatically and consistently stated over the years that "we are clearly entitled to quiet enjoyment of our apartment. Any incursion that exposes us to frequent and uncontrolled use of that portion of the appurtenant terrace impinges on that right and presents serious safety and privacy problems that some fence or bushes cannot mitigate." (Affirm in Supp., Ex. Q [Letter from Phil to Gibber, dated September 22, 2004].)

In addition, as the dispute about roof access would frequently re-occur every few years, Mr. Huyck would often state that he had "thought the issue had gone away in the intervening five years, but that is apparently not the case" or that he "welcome[d] the opportunity to pick back up on the conversation that was begun last year about your invitation that the building would pay for the installation of an attractive wrought iron fence (and gate) separating the west end of the roof from our appurtenant eastern portion." (Affirm in Supp., Ex. Q, U [March 25, 2016 Letter from Phil to Gibber].) In the correspondence from Plaintiff to Defendant over the years, Plaintiffs often threatened to sue in order to have the issue of their exclusive use resolved.

As such, the record evidence makes clear that Plaintiffs did not voluntarily abandon their claimed right to exclusive use of the rooftop, but rather Plaintiffs consistently maintained their position that they were entitled to exclusive use of the subject rooftop space. That certain residents may have been using the rooftop space—with varying degrees of regularity—does not establish a waiver of

Plaintiffs' rights because Plaintiffs were, by and large, unaware that other residents were using the subject rooftop space or reasonably believed that they were giving permission upon request to use the rooftop space.

Lastly, during oral argument Defendant's counsel stated that—notwithstanding Mr. Gibber's statement that the Board "wanted the entire roof community property"—Defendant's position was no longer that the entire northern rooftop was communal property, but rather that Plaintiffs were only entitled to exclusive use of a portion of the northern rooftop that was appurtenant to their apartment. As Defendant's counsel argued, Defendant's position is that there is a factual issue that "boil[s] down to what is the appurtenant portion of the roof that's appurtenant to [Plaintiffs'] apartment." (Oral Arg. Tr. at 22:16-25:17.)

However, Defendant has failed to put forth any evidence showing that historically the other residents of the cooperative have only used a particular section of the roof which they thought was communal space, as opposed to another portion that they believed was private, and that Plaintiffs permitted such use. (*Compare Gracie Terrace Apt. Corp. v Goldstone*, 103 AD2d 699, 700 [1st Dept 1984] [granting summary judgment to penthouse tenants declaring that they were entitled exclusive use of the eastern portion of the rooftop but finding issues of fact relating to the southern and western portions that were separated from the eastern portion by a "high security fence"].) Rather, in the Plaintiffs' experience, the other residents have used the rooftop space without concern for Plaintiffs' privacy. For example, on one occasion a resident walked in front of one the penthouse apartment windows while a guest of Plaintiffs was undressed and on another occasion Plaintiff's daughter confronted a resident who was standing on the roof of the apartment.

At most, the parties have discussed erecting a privacy fence that would restrict the other residents' access to the northwest corner of the northern rooftop as a way of settling their dispute. These settlement discussions cannot be the basis for finding that Plaintiffs have waived their rights to exclusive use of any section of the northern rooftop.

b. Plaintiffs' Offer to Purchase Additional Rights

Mr. Gibber submits an affidavit stating that "in or about the early-to-mid 2000s, Plaintiffs appeared at a Board meeting at which I was personally present" and "advised the Board that they wanted to purchase the right to use the Terrace exclusively" for approximately $100,000. (Gibber Aff. ¶¶ 28-29.) Mr. Gibber

states that the Board rejected Plaintiffs offer—including at least two more follow-up offers—"because the best interests of the Cooperative are served if all of the Building's residents can enjoy the fresh air and views from the Terrace." (Id. ¶ 32.)

Mr. Huuyck recalls the offer differently and states that, he proposed to pay $100,000 "as a payment if I could expand my studio into a one-bedroom apartment using part of the roof." (Phil Reply Aff. ¶ 24.)

Given that the proprietary lease provisions could not change without a two-thirds vote of the shareholders and with the "variation" in the proprietary lease "executed by the Lessor and lessee affected" (*see* Proprietary Lease ¶ 6), this purported offer cannot be read to change Plaintiffs' rights of exclusive use of the northern rooftop.

As such, this Court finds that Defendant fails to raise a material issue of fact concerning whether Plaintiffs' waived their right to exclusive use of the rooftop, and the first affirmative defense is hereby dismissed.

2. Laches

"Laches is an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party. The mere lapse of time, without a showing of prejudice, is insufficient to sustain a claim of laches. Prejudice may be demonstrated by a showing of injury, change of position, loss of evidence, or some other disadvantage resulting from the delay." (*In re Linker*, 23 AD3d 186, 189 [1st Dept 2005].)

As is discussed above, Plaintiffs repeatedly asserted their right to exclusive use of the rooftop adjoining their apartment. Although certain tenants appear to have used the rooftop in contravention of Plaintiffs' assertions of exclusive use and apparently with the sanction of Defendant, the only other actions Defendant took in belief that Plaintiffs' lacked exclusive use of the subject rooftop is the placement of tables and chairs on the subject rooftop in 2016 and the destruction of Plaintiff's Japanese rock garden in 2017. Plaintiffs then brought this action in June of 2017.

Given Plaintiffs' consistent assertions of their right of "exclusive use" and that they brought this action soon after Defendant began placing objects and destroying property on the rooftop, the Court finds that Plaintiffs are entitled to summary judgment dismissing the answer's second affirmative defense that the complaint is barred by laches.

3. Statute of Limitations

Since the CPLR does not prescribe a specific limitations period for a declaratory judgment action, the applicable statute of limitations for such an action depends on the underlying claim and the nature of the relief sought. (*See Vigilant Insurance Company of America v. Housing Authority of the City of El Paso, Texas*, 87 NY2d 36, 40-41 [1995]; *Solnick v. Whalen*, 49 NY2d 224, 229 [1980]; *Rosenthal v. City of New York*, 283 AD2d 156 [1st Dept 2001].) If the nature of the underlying action reveals that the dispute could have been resolved through a specific action or proceeding for which a specific limitations period is prescribed, that limitations period is applicable. Otherwise, the six-year catch-all statute of limitations set forth in CPLR 213(1) applies. Here, Plaintiff seeks a determination of its rights under the proprietary lease, so the six-year statute of limitations for a breach of contract action would apply to this action.

Defendant argues that this six-year period began to run by at least September 22, 2004, when Mr. Huyck sent a letter to Mr. Gibber, stating that, "[t]he post-closing assertion of some reduction of our exclusive use of the appurtenant terrace as specified in the proprietary lease raises some very real concerns for us." (Ex. Q [September 22, 2004 Letter from Mr. Huyck].)

However, this merely indicates that there was a dispute about the interpretation of paragraph 7 of the proprietary lease. Defendant did not materially breach this provision until it placed furniture on the subject rooftop in 2016. That certain tenants may have been obtaining a key from the doorman to access the rooftop—and only doing so after the doorman called up to Plaintiff's apartment—does not trigger the limitations period. From Plaintiffs' perspective, the lease was not being breached, but rather they were politely giving permission to their neighbors to use the rooftop upon request. Until 2016, the northern rooftop remained decorated with Plaintiffs' furniture and renovation work, was only accessible to others through use of a key and was denominated as being subject to Plaintiffs' "exclusive use" in the proprietary lease.

As such, this Court rejects Defendant's assertion that the statute of limitations period has run, and this third affirmative defense is dismissed.

4. The Purported Modification of the Proprietary Lease by the 1999 Renovation Agreement

Defendant argues that the 1999 Renovation Agreement merely provides further evidence that the parties agreed and understood that at the very least a portion of the Terrace was available for common use—apparently withdrawing their affirmative defense that 1999 Renovation Agreement modified the proprietary lease.

The 1999 Terrace Renovation Agreement states in relevant parts:

> "No Expansion of the Apartment. The Shareholder and the Co-op understand, acknowledge and agree that no increase in the space within the Building allocated to the exclusive use of the residents of the Apartment (or to the shareholder of the Apartment) shall take place or be deemed to have occurred as a result of the Improvements. The Shareholder understands, acknowledges and agrees that no additional shares of the cooperative corporation shall be issued or allocated to the Apartment as a result of the Improvements, and that the Shareholders shall be entitled to cast the same absolute and relative number of votes at any meeting of the shareholders of the Co-op after the completion of the Improvements as they did prior to this Agreement."
>
> No Change in Exclusive Use of Outdoor Space. The Shareholder and the Co-op further understand, acknowledge and agree that notwithstanding the Improvements, no change in the exterior or roof space allocated to the exclusive use of the residents of the Apartment shall be effected by reason of this Agreement or the Improvements."

(1999 Terrace Renovation Agreement [emphasis in original].)

This agreement makes clear that Paragraph 7 of the proprietary lease remains in full effect. As just discussed, this Court interprets paragraph 7 of the lease as giving Plaintiffs exclusive use of the rooftop space appurtenant to their apartment—which is clearly the entirety of the northern rooftop space (as opposed to the southern rooftop space).

Defendant further argues that the following statements indicate a recognition by both parties that the subject roof was intended to be common space:

> "The Shareholder has proposed to make certain alterations and improvements to the Apartment and to the common and outdoor spaces within the Building adjoining the Apartment at Shareholder's sole cost and expense.
>
> The Co-op has determined that the proposed alterations and improvements, provided they are realized on the terms and subject to the conditions of this Agreement, will enhance the value of the Building for all shareholders and residents and are in the best interests of the Co-op."

(Id.) With regard to the reference to "common spaces," that phrase must be read to include specific portions of the roof that Plaintiff was not entitled to exclusive use of, such as the water tower or other infrastructure that existed to benefit all lessees in common. Further, that "the Co-op" determined that the renovation would enhance the value of the building is a general statement, and it cannot be read to mean that the building's value would be enhanced because shareholders would enjoy access to a newly renovated roof. For example, the building's value could have been enhanced by bringing the parapet wall up to code, as contemplated in paragraph 4 (c) of the 1999 Renovation Agreement.

5. Failure to State a Cause of Action

The Court dismisses this fifth affirmative defensive outright. The complaint clearly states a cause of action, and Defendant did not move to dismiss the complaint on such grounds.

6. Failure to Maintain Roof

Defendant asserts in the answer as an affirmative defense that "Plaintiffs have failed to maintain the roof area adjacent to their apartment, have caused and permitted the drains to become clogged, have created a hazardous condition; and have otherwise endangered the safety and well-being of the other shareholders in the building." (Affirm. in Supp., Ex. C [Answer] ¶ 26.)

Plaintiffs' alleged failure to maintain the roof could, at best, provide a basis for a counterclaim for damages for any alleged damage that was proximately caused by their failure to maintain. However, such a failure to maintain cannot be the basis for an affirmative defense to this Court declaring that Plaintiff is entitled to exclusive use of the rooftop.

7. Adverse Possession

"To establish a claim of adverse possession, the occupation of the property must be (1) hostile and under a claim of right (i.e., a reasonable basis for the belief that the subject property belongs to a particular party), (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the statutory period (at least 10 years)." (*Estate of Becker v Murtagh*, 19 NY3d 75, 81 [2012].)

As a preliminary matter, this Court notes that this dispute does not actually pertain to a dispute about ownership of real property, but rather about rights of "exclusive use" under a proprietary lease. As such, the doctrine of adverse possession does not appear to be relevant.

Nonetheless, even if it were, Defendant would still fail to meet the elements as a matter of law. For example, "[t]o establish the 'exclusivity' element, the adverse possessor must alone care for or improve the disputed property as if it were his/her own." (Id. at 83.) However, Defendant only seems to have shown evidence of "improving" the property when it placed furniture on the roof in 2016 and then tore up the Japanese rock garden that Plaintiffs' had built. In addition, that these other tenants only accessed the subject rooftop after obtaining a key from the doorman who called up to the Plaintiff's apartment—ostensibly obtaining Plaintiffs' consent—negates the "open and hostile" element.

8. That Plaintiffs' Are Only Entitled to Exclusive Use of a Portion the Rooftop Adjoining Their Property

As the Court has explained, Plaintiffs have established prima facie entitlement to "exclusive use" of the northern rooftop adjoining their apartment. To be clear, Plaintiffs are not entitled to exclusive use of the entire rooftop—i.e. both northern and southern portions of the rooftop or any space above their apartment. Rather, per paragraph 7 of the proprietary lease being read as interpreted by *Rose*, Plaintiffs are only entitled to exclusive use of the portion of the rooftop that is appurtenant to their apartment which is the entire northern portion of the rooftop that adjoins their apartment for which they have access from their apartment.

Defendant has failed to put forth any evidence raising an issue of fact as to whether a specific portion of the northern rooftop would be segregated from the Plaintiffs' exclusive use. As Mr. Gibber admitted during the preliminary injunction hearing, he was not aware of any map, drawing, or document that

delineates specific portions of the roof or "says this portion is for this person's use, this portion is for this person's use[.]" (Affirm. in Supp., Ex. D1[PI Hearing Tr.] at 453:02-23.) Moreover, the diagram attached to the 1999 Renovation Agreement shows that the renovation work (paid for almost exclusively by Plaintiffs) encompassed the entirety of the northern rooftop. (Affirm. in Supp. Ex. M-1 [1999 Renovation Agreement Diagram]; *see also* Ex. X [Photographs of Rooftop].)

As such, the Court dismisses this eighth affirmative defense.

III. Plaintiffs' Are Entitled to the Requested Declaratory Relief and to Dismissal of Defendants' Affirmative Defenses.

Based on the papers submitted on this motion and after hearing oral argument, the Court finds that Plaintiffs have established prima facie entitlement to the requested declaratory relief—that they are entitled to "exclusive use" of the northern rooftop adjoining their penthouse apartment. To be clear, the Court finds that the word "appurtenant," as used in Paragraph 7 of the proprietary lease, means what it says and the Court interprets its meaning as a question of law, following *Gracie Terrace*, *Rose*, and *Rushmore*: Plaintiff is entitled to exclusive use of the northern rooftop as described previously.

The Court further finds that Defendants have failed to a raise a material issue of fact sufficient to deny the instant motion. Accordingly, the Court grants the branch of Plaintiffs' motion seeking declaratory relief and dismissing all of Defendant's affirmative defenses.

IV. Plaintiffs' Are Entitled to Reasonable Attorney Fees Pursuant to Paragraph 28 of the Proprietary Lease

Paragraph 28 of the proprietary lease states:

> "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 counterclaim in, any action or proceeding brought by the 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."

(Id.)

Rose contained a virtually identical prevailing party clause, and the First Department found that the *Rose* Plaintiffs were entitled to said attorney fees as the prevailing parties, given Real Property Law § 234's requirements that such clauses be reciprocal. (*Rose v 115 Tenants Corp.*, 150 AD3d 472 [1st Dept 2017].)

Accordingly, this court awards Plaintiffs their reasonable attorney fees and refers this issue for inquest.

CONCLUSION

ORDERED that the branch of Plaintiffs Peter Huyck and Mary Huyck's motion that seeks summary judgment in Plaintiffs' favor on the complaint and a declaratory judgment with respect to the subject matter of that cause of action is granted; and it is further

ADJUDGED, DECLARED and ORDERED that Plaintiffs are entitled under the terms of the February 16, 1999 proprietary lease to the exclusive use of those portions of the roof adjoining apartment PH2 (the "northern rooftop") in the building located at 171 West 79th Street, New York, New York (the "building"), that are not used for building components, subject to emergency access, such regulations as the cooperative corporation shall promulgate, and the Building superintendent and any other workers necessary to properly maintain the Building having full access to all parts of the roof as in the past, for the purposes of maintenance, repair, or improvement, during the pendency of the proprietary lease and any extension thereof; and it is further

ADJUDGED, DECLARED and ORDERED that that Defendant and its officers, directors, employees and shareholders shall not give other residents of the building access to the northern rooftop by separate key or otherwise and that Defendant and its officers, directors, employees and shareholders shall not place furniture on the northern rooftop, erect any fences or take other steps to partition or divide the said northern rooftop or otherwise limit, disrupt and/or interfere with the Plaintiffs' exclusive use of the northern rooftop during the pendency of the proprietary lease and any extension thereof; and it is further

ORDERED that any temporary and/or removable barriers or any other infrastructure/furniture placed on the northern rooftop, pursuant to the prior court's preliminary injunction order of July 27, 2017, shall be removed by Defendant within thirty (30) days of the filing of this order; and it is further

ORDERED that the prior court's preliminary injunction order of July 27, 2017 is vacated; and it is further

ORDERED that the branch of Plaintiffs' motion that seeks summary judgment dismissing the affirmative defenses is granted in its entirety; and it is further

DECLARED that Plaintiffs are entitled to reasonable attorney fees pursuant to paragraph 28 of the proprietary lease and Real Property Law § 234 as the prevailing parties in this action; and it is further

ORDERED that the portion of Plaintiffs' action seeking recovery of reasonable attorney fees is severed and continued, and the issue of the amount of Plaintiffs' reasonable attorney fees is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that counsel for Plaintiffs shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that the Clerk shall enter judgment accordingly, with costs and disbursements to Plaintiffs as taxed by the Clerk; and it is further

ORDERED that Plaintiff shall serve a copy of this order with notice of entry upon Defendant and upon the Clerk of the Court within thirty (30) days of the filing of this order.

The foregoing constitutes the decision, order, and judgment of this Court.

11/19/2018
DATE

HON. ROBERT D. KALISH
J.S.C.

CHECK ONE:	[X] CASE DISPOSED		[ ] NON-FINAL DISPOSITION	
	[X] GRANTED	[ ] DENIED	[ ] GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE