SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

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INDEX NO. 154642/2017

JUSTIN THEROUX,

MOTION SEQ. NO. 002

Plaintiff,

- v -

NORMAN J. RESNICOW and BARBARA RESNICOW,

Defendants,

DECISION AND ORDER

- and -

71 WASHINGTON PLACE OWNERS, INC. and BOARD OF DIRECTORS OF 71 WASHINGTONG PLACE OWNERS, INC.,

Nominal Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 48, 49, 50, 51, 56, 59, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 104, 118, 119, 120, 121, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142

were read on this motion for PARTIAL SUMMARY JUDGMENT.

*Pryor Cashman LLP (*Eric D. Sherman, Esq., Bryan T. Mohler, Esq., and Rebecca L. Matte, Esq. of counsel) New York, for plaintiff.
Peter M. Levine, Esq., New York, for defendants Norman J. Resnicow and Barbara Resnicow

Gerald Lebovits, J.:

This motion, the latest installment in an ongoing quarrel between neighbors in a co-op apartment building, concerns a dispute over who owns a 2-foot by 20-foot strip of a shared rooftop terrace.

I. BACKGROUND

Plaintiff, Justin Theroux, filed a complaint against defendants Norman J. Resnicow and Barbara Resnicow, his downstairs neighbors in Apartment 1A at 71 Washington Place in New York County (the "Building"), for allegedly depriving Theroux of his right to enjoy his property, Apartment 2B.

Theroux contends that the Resnicows have engaged in a malicious and years-long harassment campaign that includes frivolously challenging the boundary line between Theroux's and the Resnicows' shared roof deck.

Under the co-op offering plan, the Resnicows have the right to use the portion of the roof deck from the rear wall of the building forward to the boundary line, with the exception of a staircase, located at the rear wall of the building, that leads down from Theroux's apartment to the deck. Theroux has the use of the stairs and the rest of the deck (from the boundary line forward to the parapet at the front of the building).[1]

The principal issue on this motion is whether the boundary line is at the bottom edge of the last step of the staircase, as Theroux claims, or at the bottom edge of the staircase's *stringers* (the frames on either side of the staircase into which the steps are fixed), as the Resnicows claim. The stringers extend approximately two feet beyond the last step.[2]

The parties are thus disputing whether the 40-square-foot strip of roof deck extending forward from the last step to the edge of the stringers, and extending laterally the full width of the building, is on Theroux's or the Resnicows' side of the line.

Both Theroux and the Resnicows have sought declaratory judgment for the court to fix the location of the roof-deck boundary line. Theroux has also brought a claim alleging that Mr. Resnicow committed trespass by placing some bricks on Theroux's portion of the deck and repeatedly entering onto his property.

The Resnicows now move for partial summary judgment in their favor on Theroux's request for a declaratory judgment. Theroux cross-moves for summary judgment in his favor on his own request for a declaratory judgment (and dismissing the Resnicows' request for declaratory judgment). Theroux also moves for summary judgment on his trespass claim.[3]

II. DISCUSSION

To prevail on a motion for summary judgment, the movant must tender sufficient evidence to demonstrate the absence of any material issues of fact, thus showing that the party is entitled to a judgment as a matter of law. (*Stonehill Capital Mgmt. LLC v Bank of the W.*, 28 NY3d 439, 448 2016]; CPLR 3212 [b].)

This court concludes that no material issues of fact exist here, because the evidence establishes as a matter of law that the boundary line at issue begins at the *bottom edge* of the last *step* of the staircase. Theroux is thus entitled to summary judgment on the parties' claims regarding the location of the boundary line. This court also holds that Mr. Resnicow's repeated entries into Theroux's property constitute trespass as a matter of law.

A. Declaratory Judgment

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[1] For visual reference, a photograph of the roof deck (taken from above and looking toward the front of the building) can be found at NYSCEF No. 23.

[2] For a close-up photograph of the staircase that shows the gap between the last step and the edge of the stringers, see NYSCEF No. 88.

[3] Theroux's summary-judgment motion on the trespass cause of action is expressly limited to the question of liability, and defers the issue of damages for later proceedings.

The location of the boundary line of the roof deck cannot be determined from the ambiguous terms of the offering plan by examining the extrinsic evidence, however, the parties' custom and practice shows their understanding that the boundary line between the two portions of roof deck is located at the bottom edge of the last step of the staircase (as Theroux claims) — not two feet further forward at the edge of the staircase's stringers (as the Resnicows claim).

1. The Offering Plan is ambiguous.

A court may grant summary judgment on a claim arising out of a written instrument when its language is unambiguous or when the instrument is ambiguous but undisputed extrinsic evidence is so one-sided that no reasonable fact-finder could decide contrary to one of the party's interpretation of the instrument. (*Mallad Constr. Corp. v County Fed. Sav. & Loan Ass'n*, 32 NY2d 285, 290, 293 [1973]; *American Exp. Bank Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990].)

A written agreement is unambiguous when its language is clear and complete and when its terms can be read in their ordinary meaning. (*S. Rd. Assocs., LLC v Int'l Bus. Machines Corp.*, 4 NY3d 272, 277 [2005]; *Lopez v Fernandito's Antique, Ltd.*, 305 AD2d 218, 219 [1st Dept 2003].)

The co-op offering plan describes the line that divides the roof terrace between Apartment 1A (Resnicows) and Apartment 2B (Theroux) in three ways. The first, under the plan's Description of the Property section, provides that "Apartment 1-A shall have the right to use . . . (b) that portion of the roof terrace . . . running the full width of the Building, from a line extending from the rear wall of the Building mezzanine northward approximately thirteen feet to the bottom edge of, but not including the use of, the steel stairs . . . Apartment 2-B shall have the right to use . . . (b) that portion of the roof terrace . . . running the full width of the Building, from a line beginning from the bottom edge of, and including the use of, the steel stairs approximately eleven feet to the north parapet."

The second, the Room and Finish Schedule of Apartments section of the offering plan (on page 176 of the plan), describes the Resnicows' share of the roof deck as the "Portion extending from rear wall of mezzanine to bottom end of stair from above."

The third, the same section (on page 178 of the offering plan), describes Theroux's share of the deck as the "Portion extending from lower edge of stair to edge of roof."

The offering plan thus describes the roof terrace boundary in three slightly different ways. As a result, the proper location of the dividing line hinges on the definition of "stair" and the use of the words "bottom edge" and "bottom end." To determine the ordinary meaning of a contract's terms, courts may refer to dictionaries. (*E.g. Bianco v Bianco*, 36 AD3d 490, 491 [1st Dept 2007].) Given that the offering plan does not define the word "stair" and it uses "bottom edge" and "bottom end" interchangeably, the parties have submitted different definitions of "stair" and interpretations of the usage of "bottom edge" and "bottom end" to support their respective claims.

Theroux proposes that "stair" properly refers to a single step, the "horizontally-oriented portion of a staircase that a person steps on when ascending or descending, not the diagonally-oriented metal stringer to which the stairs are affixed," as defined by the Merriam Webster dictionary and the MacMillan dictionary. He claims that steel stringers are distinct and separate components of a stairway; in doing so, he relies on New York City Administrative Code § 27-375, which differentiates between the width of stairs and the stringers on each side of a staircase. Therefore, Theroux argues that the offering plan's terms place the dividing line at the *bottom edge* of the last *step* of the staircase.

The Resnicows submit that the court should rely among other things on the definition of "stair" provided by other dictionaries and by § 27–2004 (a) (40) of the New York City Housing Maintenance Code. That provision provides that a "stair is a flight or flights of steps together with any landings and parts of public halls through which it is necessary to pass in going from one level thereof to another."

The Resnicows claim that this definition is consistent with the use of the word "stair" in the Offering Plan, which refers to a staircase and not single steps throughout the document. Accordingly, the Resnicows assert that the dividing line is located at the *bottom end* of the stringer or the landing of the *staircase*. Theroux, however, argues that this definition does not make sense. He states that because drawing the boundary line there would create a gap between the last step of the staircase and the beginning of Theroux's portion of the terrace — thus in effect forcing him to trespass the Resnicows' property every time he enters into his roof terrace from the stairs.

After examining both definitions of "stair" provided by each party, the court concludes that both interpretations are plausible and reasonable and therefore that the offering plan is ambiguous.

The word "stair" is inconsistently used throughout the offering plan. Section I of the offering plan uses the words "bottom edge" and "stairs" in the plural to describe the dividing line of the roof, while the descriptions under the Room and Finish Schedule of Apartments section on pages 176 and 178 use the words "bottom end" and "stair" in the singular and "lower edge" and "stair" also in the singular. These terms are used interchangeably and are not dispositive on the legal location of the dividing line. Further, the word "approximate" included in these descriptions to establish the size in feet of the respective terrace portions is inadequate to determine the precise location of the boundary line.

Based on Theroux's definition of "stair," it is entirely possible that the offering plan refers to the *bottom edge* of the single last *step* on the staircase. Yet, it is also plausible for it to refer to the *end* of the *staircase* as proposed by the Resnicows and supported by the other definitions of "stair." Contrary to Theroux's contention, this location is not unreasonable and would not force him to trespass the Resnicows' property; the offering plan gives Theroux the right to use the stairs, which includes the stairs' landing on the roof deck under the Resnicows' definition.

Because neither definition of "stair" nor the two proposed locations of the dividing line resulting from adopting any of these definitions would create an absurd result, the offering plan is ambiguous. Hence, the undisputed extrinsic evidence must be considered to determine the line's location. (*See County Fed. Sav. & Loan Ass'n*, 32 NY2d at 293.)

2. The undisputed extrinsic evidence shows that the parties' understanding of the offering plan marks the boundary at the *bottom edge* of the last *step*.

Theroux argues that 15 years of custom and usage show that the proper dividing line begins at the *bottom edge* of the last *step*. He notes that a fence marked this boundary from 2000 to 2015 without anyone's disputing the fence's location. Theroux submits that this fence was constructed with the Corporation's board of directors' approval and that the previous owner of Apartment 1A did not dispute the fence's location. Further, he contends that the Resnicows did not dispute it when they moved into Apartment 1A in 2004, when Theroux replaced the fence and decking along the same dividing line in 2005, or at any time between 2005 and 2015. Theroux claims that the Resnicows disputed the roof terrace boundary only in 2015 as a retaliatory tactic because Theroux did not fix an alleged leak emanating from Theroux's portion of the roof and affecting the Resnicows' apartment.

The Resnicows assert that Theroux cannot claim custom to show that the proper boundary begins at the *bottom edge* of the last *step*. The Resnicows note that Theroux's 2015, 2016, and 2017 plans to remodel the roof terrace and Theroux's amended complaint dated May 27, 2017, show different locations of the boundary. Moreover, the Resnicows argue that because they have a larger number of shares in the co-op and pay higher monthly maintenance charges than Theroux, they are entitled to a proportionally larger portion of the roof deck.

This court finds the Resnicows' arguments unpersuasive. Where ambiguity is in a written agreement, the applicable custom, usage, or practice should be taken into consideration to interpret the parties' intent when they entered into the agreement. (*Stolt-Nielsen S. A. v AnimalFeeds Int'l Corp.*, 559 U.S. 662, 674 n 6 [2010]; *Excess Ins. Co. v Factory Mut. Ins.*, 3 NY3d 577, 590–591 [2004]).

The Resnicows do not deny that they never contested the location of the fence in the 15 years before the dispute over the roof leak. In fact, the Resnicows' own exhibits and memorandums demonstrate that Theroux at all times intended to replace the roof deck in the same location where it was previously installed for 15 years: at the *bottom edge* of the last *step* of the staircase. Therefore, this 15-year old custom is undisputed evidence.

Further, although the design and architectural plans for the new roof show different measurements, they were only initial remodeling plans on the aesthetics of the terrace and the differences in dimensions are minimal. The plans display a roof deck measuring 11' 6 ¼," whereas Apartment 2B's share of the roof terrace would be 11' 8" if the boundary began at the *bottom edge* of the last *step* of the staircase. This less-than-a-two-inch difference does not come close to the approximate 20 inches that the Resnicows are disputing by claiming a dividing boundary at the *end* of the *staircase* stringers. This is not dispositive of the parties' custom and usage.

In addition, the court cannot interpret the contract to include terms not within the written agreement, and nothing in the offering plan indicates that the division of the roof hinges on the number of shares or dollar amount paid to cover maintenance charges. (*See Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 [2004].)

The undisputed location of the 15-year-old fence and roof-terrace boundary shows custom and practice that the parties' understanding of the offering plan was for Theroux to own and use the portion of the terrace from the dividing line starting at the *bottom edge* of the steel *step* to the rear wall of the building. This location of the dividing line is the most consistent and close interpretation of the offering plan

B. Reformation

Because this court finds that the offering plan's boundary line runs from the *bottom edge* of the steel *step* to the rear wall of the building, Theroux's motion for reformation is denied as academic.

C. Trespass

Theroux argues that Resnicow trespassed onto Theroux's property by repeatedly placing bricks along the width of the terrace to mark the boundary line the Resnicows claim is the correct one. Additionally, he claims that Resnicow trespassed multiple times in 2017 when he entered Theroux's roof terrace, as shown by the images from Mr. Resnicow's security camera depicting Resnicow over the brick boundary line and onto Theroux's property.

Theroux claims that he informed Resnicow that he was not entitled to enter Theroux's roof terrace but that Resnicow continued to trespass. Theroux therefore eventually filed a motion for preliminary injunction on December 2017 to prevent Resnicow from trespassing again.

The Resnicows do not deny placing a row of bricks along the north edge of the staircase stringers. They claim that the purpose of doing so was visually to communicate to Theroux the alleged proper demarcation of the roof terrace boundary line. Theroux contends, though, that even if the dividing line were located at the *bottom end* of the *staircase* stringers, Resnicow still committed trespass: because the *rear* edge of the bricks was aligned with the end of the staircase stringer, the bricks extended past the stringer onto Theroux's property.

The Resnicows argue that even if the bricks extended a few inches past the stringers, this minimal encroachment does not amount to trespass. But even a minimal invasion of another's property constitutes trespass. (*See Standard Realty Assocs., Inc. v Chelsea Gardens Corp.*, 105 AD3d 510, 510 [1st Dept 2013].) And it is undisputed that the bricks extend a few inches onto Theroux's property on *either* location of the boundary line.

The Resnicows claim that such a de minimis encroachment is not trespass, relying on *Hoffmann Inv'rs Corp. v. Yuval* (33 AD3d 511, 512 [2006]). But *Hoffman* does not support them.

Hoffman held simply that the fact that defendants' wall encroached "1½ to 3¾ onto [the] plaintiff's property" did not warrant the remedy of requiring defendants to rebuild the wall, because such a requirement would greatly burden defendants while conferring only a minimal benefit on plaintiffs. Here, Theroux's motion is limited to liability, without implicating the remedial issue discussed in *Hoffman*.

The Resnicows also argue that the photos showing Resnicow on Theroux's terrace are explained by the Resnicows' right to trespass onto Theroux's property to abate the nuisance that the leak created. They submit that the leak seriously interfered with their enjoyment of their property because the water damaged their apartment and generated mold.

This court disagrees.

But though a trespass may be justified when there is a reasonable necessity to prevent serious harm to trespassers, their land, or their belongings, the Resnicows do not meet this standard. (*See* Restatement [Second] of Torts § 197 [1965].)

The Resnicows misplace their reliance on *Courtney v. 18th & 8th LLC* (145 AD3d 471, 471–472 [1st Dept 2016]). In that case, the Court held the trespass justifiable because the nuisance was sewage flowing onto the other party's property, which the Department of Environmental Protection had declared a health hazard. (*See id.*)

Here, there is no evidence that the leak was a health hazard, caused serious harm, or created an emergency. The Resnicows complain that the leak produced mold that adversely affected their health — Mr. Resnicow claims that he is on a daily dose of a steroid inhaler as a result of the leak. But they did not provide sufficient evidence to establish that the mold issue posed a serious and impending danger that warranted the acts of trespass that Resnicow committed. For example, on September 22, 2017, Resnicow entered Theroux's property merely for discussions with Theroux's contractors about the tarp covering the roof and the possibility of rain that weekend. On another occasion in October 2017, Resnicow entered Theroux's portion of the roof deck purportedly to secure a plastic outdoor light fixture to prevent the possibility that it would get loose due to strong winds. These trespasses were not justified by circumstances giving rise to a need to enter Theroux's property to prevent serious harm.

Consequently, this court finds that Mr. Resnicow is liable for trespassing on Theroux's property. The court defers any consideration of the issue of damages (if any) for trial in this action.

Accordingly, it is hereby

ORDERED that the Resnicows' motion for summary judgment on their declaratory-judgment counter-claim is denied, and Theroux's cross-motion for summary judgment on his declaratory judgment claim is granted; and it is further

ORDERED that Theroux's request in the alternative for reformation of the co-op offering plan is denied as academic; and it is further

ORDERED that Theroux's motion for summary judgment on liability on his claim for trespass is granted, and the issue of damages (if any) will be resolved at trial; and it is further

ORDERED that the issue of attorney fees and costs related to this motion will be resolved at the end of the action.

06/25/2019
DATE

GERALD LEBOVITS, J.S.C.

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