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

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

*Justice*

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J. ARMAND MUSEY,

Plaintiff,

- v -

425 EAST 86 APARTMENTS CORP., DOUGLAS ELLIMAN PROPERTY MANAGEMENT, FRANK CHANEY, PATRICIA CARBON, DAVID MUNVES, MICHAEL CONSIDINE, SUZANNE KEANE, JENNIFER KRUEGER, GEORGE GREENBERG, ALEXANDER SHAPIRO, LESLIE SPITALNICK

Defendants.

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**INDEX NO.** 157316/2014

**MOTION DATE** 02/27/2019

**MOTION SEQ. NO.** 004

**DECISION AND ORDER**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251

were read on this motion for LEAVE TO AMEND.

*Hinman, Howard & Katell, LLP* (Stuart Sugarman of counsel), and *Paykin Krieg & Adams, LLP* (Charles D. Krieg of counsel), for plaintiff.
*Braverman Greenspun, P.C.* (Tracy Peterson of counsel), for defendants 425 East 86 Apartments Corp., Douglas Elliman Property Management, Frank Chaney, Patricia Carbon, David Munves, Michael Considine, Suzanne Keane, Jennifer Krueger, Alexander Shapiro and Leslie Spitalnick.
*Gordon & Rees, LLP* (Steve Berlin, and Ryan Sestack of counsel), for defendant George Greenberg.

GERALD LEBOVITS, J.:

Plaintiff J. Armand Musey commenced this action against defendants 435 East 86 Apartments Corp. (Co-op), which owns real property located at 425 East 86th Street, New York, New York (Building), individual members of the Co-op board (Board) and Douglas Elliman Property Management (Douglas Elliman), the Building's property manager. The dispute arose following plaintiff's purchase of stock representing exclusive ownership of the Building's penthouse apartment # PHA (Apartment). Plaintiff claimed that certain roof and terrace areas adjoining the Apartment were intended for his exclusive use, but were the responsibility of the Co-op to make habitable.

Pursuant to previous decisions in this action, the sole remaining claim is against the Co-op for the cost of replacing the Apartment's three doors leading to the terrace (Terrace Doors). All other claims and parties have been dismissed.

Plaintiff now moves, pursuant to CPLR 3025, for leave to file an amended complaint to bring a CPLR Article 78 proceeding as well as a plenary action, individually and derivatively, against the Co-op.

I. Background and Procedural History

The underlying facts of this case were stated in detail in the decision and order dated July 16, 2015 (2015 Decision), as well as the decision and order dated January 26, 2017 (2017 Decision, together with the 2015 Decision, Decisions). The court, therefore, provides only a brief recitation of the facts and the procedural history.

On February 27, 2013, plaintiff purchased the stock shares referable to the Apartment. He understood that, pursuant to the proprietary lease (Lease), certain roof and terrace areas were deemed to be part of the Apartment. Because the Building's roof was undergoing substantial repairs, he was unable to inspect the roof and terrace areas before purchasing the Apartment. According to plaintiff, when construction on the roof concluded on July 27, 2013, he learned, for the first time, that the Co-op had installed a membrane that was not intended to be walked upon. Also in July 2013, plaintiff learned that the Board had adopted new roof/terrace standards (Roof/Terrace Standards), which were incorporated into the Co-op's house rules (House Rules) and required plaintiff to protect the roof membrane from foot traffic, planters and furniture, and to indemnify the Co-op against any damage to the roof membrane or the apartments below caused by plaintiff's use of the roof terrace. In addition, in April 2014, plaintiff learned that all three of the Apartment's Terrace Doors required replacement.

On July 25, 2014, following the Co-op's refusal to renovate the terrace and replace all three Terrace Doors, plaintiff commenced this action, asserting claims for: (1) breach of fiduciary duty against the individual Board members; (2) fraud against the individual Board members; (3) a declaration that the House Rules violated the terms of the Lease relating to the ownership and use of the terrace, that the terrace should have been delivered in a habitable condition and that the Co-op should replace the Terrace Doors; and (4) breach of plaintiff's right, under the Lease, to quiet enjoyment of the terrace against Douglas Elliman and the Co-op.

Defendants moved pursuant to CPLR 3211 and 3212 to dismiss the complaint. Plaintiff cross-moved for summary judgment in his favor on the third and fourth causes of action. In the 2015 Decision, Justice Wooten dismissed the first two causes of actions for breach of fiduciary duty and fraud in their entirety, finding that the plenary action was not the proper vehicle to challenge the actions of the Board and that the time to commence a CPLR Article 78 proceeding had expired. In addition, he found that the complaint failed to allege actionable tortious conduct by the individual Board members. The court also granted summary judgment in favor of the Co-op to the extent the third cause of action sought a judicial declaration that sections of the House Rules were null and void, finding the claim to be time-barred. To the extent the third cause of action sought a declaration directing the Co-op "to take all actions required to make the terrace habitable, including but not limited to, the installation of the flooring surface over the terrace membrane enabling it to withstand ordinary expected use" (complaint, ¶ 56), Justice Wooten found that the House Rules "govern[ed]. . . and ma[d]e no provision [for the Co-op] . . . to take the actions sought by plaintiff." NYSCEF document number 93 at 9. The court, therefore,

declined to "declare adherence to an agreement that [did] not exist." *Id.* However, the court retained the branch of the third cause of action relating to the Terrace Doors and the fourth cause of action for breach of contract against the Co-op, finding that triable issues existed regarding whether the Co-op or plaintiff was responsible for replacement of the doors and for making the terrace habitable. Lastly, the court dismissed the breach of contract claim against Douglass Elliman, because it was not a party to the Lease and could not be held liable in its role as managing agent.

In its 2017 Decision, deciding plaintiff's and the Co-op's subsequent motions to reargue portions of their motions for summary judgment, the court found, in pertinent part, as follows:

> "The lease terms are governed by the House Rules, which provide that the lessee bears sole financial responsibility for protecting the roof membrane from the consequences of the lessee's use of the terrace.
>
> * * *
>
> ". . . Together, the lease and the House Rules operate to contractually obligate [plaintiff], as a penthouse apartment lessee, to pay for the renovation of the roof space into a terrace space usable as and an entertainment area."

NYSCEF document number 197 at 6-7, 8. Accordingly, Justice Wooten dismissed the fourth cause of action for breach of the Lease against the Co-op, concluding that granting relief to plaintiff would require "disregard[ing] the plain meaning of the relevant lease terms and the House Rules and, instead, rewrite[ing] them." *Id.* at 8. In the same decision and order, the court also denied plaintiff's motion for leave to amend the complaint to further define previously asserted claims and to assert new claims against the Co-op. The court also granted the Co-op's separate motion to quash two non-party subpoenas issued by plaintiff. Plaintiff appealed the Decisions. By decision and order dated October 3, 2017, the Appellate Division, First Department affirmed.

At this time, all that remains of the litigation is that portion of the third cause of action relating to the Terrace Doors, which plaintiff has, in the interim, replaced at his own expense. Plaintiff now seeks to amend the complaint based on his alleged interactions with the Co-op following the Decisions.

II. Allegations of the Proposed Amended Complaint (PAC)

Plaintiff states that the Apartment has a terrace that is level with the floor of the Apartment (Terrace) and also a roof that is above the living space of the Apartment (Roof). On August 30, 2018, he submitted a scope of work description and an architectural plan to the Co-op, which included alterations to the Roof to render it habitable for plaintiff's use. On October 3, 2018, the Co-op refused permission for such work, explaining that "the proprietary lease does not afford the penthouse owners the exclusive use of the roof space above the two penthouse apartments." Musey aff, exhibit A.

In pertinent part, the Lease provides:

> "7. If the apartment includes a terrace, balcony, or portion of the roof adjoining a penthouse, the Lessee shall have and enjoy the exclusive use of the terrace of balcony or that portion of the roof appurtenant to the penthouse, subject to the applicable provisions of the 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 installation for the repairs thereof. . . ."

PAC, exhibit B.

According to plaintiff, the Lease, as well as the minutes from a Board meeting held on September 7, 1999 (1999 Board Minutes), demonstrate that the Roof is intended for his exclusive use. In pertinent part, the 1999 Board Minutes state as follows:

> "Terraces The Board decided to accept the conclusion from Herb Cohen, the building attorney, with regard to the Penthouse Terrace area. The Board concluded that there is no legal basis for any claim to be made to any part of the roof area. Penthouse owners have exclusive right to the use of those areas. George Greenberg abstained from the discussion."

*Id.*, exhibit C.

In addition, plaintiff alleges that the Terrace is only accessible from the Apartment and a stair bulkhead door, which is armed with an alarm and is for maintenance and emergency access only. He states that the only way to access the Roof is from the Terrace, by a ladder attached to the Apartment's exterior wall. Plaintiff also alleges that the Co-op has previously approved his installation of a heater/air-conditioning compressor on the Roof and that the only other equipment on the Roof is a water tower, an enclosed and locked elevator mechanical shed and a small water pump, all of which occupy a small portion of the Roof. Finally, plaintiff alleges that the Co-op has agreed to provide him with adequate notice before accessing the Roof or the Terrace and that the Co-op has generally provided such notice.

Plaintiff also alleges that the Co-op has provided favorable treatment to George Greenberg (Greenberg), a longtime member of the Board, as well as its president for a number of years until 2011, and the shareholder/lessee of the Building's only other penthouse apartment. Plaintiff alleges that the Co-op has refused to cooperate with his attempts to renovate the Terrace

in compliance with the Roof/Terrace Standards and the Decisions, while simultaneously ignoring Greenberg's violations of Roof/Terrace Standards, building regulations and the fire code.

More specifically, plaintiff alleges that, as of the time of this motion, the Co-op has failed to provide requested information necessary to proceed with the renovations, such as information about the roof membrane warranty that plaintiff is required to preserve under the Roof/Terrace Standards, design specifications for any covering, the condition of the parapets, which will need to be raised to accommodate any covering, and information about the status of the unabated asbestos in the area. In addition, he alleges that the Co-op has required him to take extra steps before it would consider his proposal, such as submitting an alteration agreement and paying a $2,500 deposit. Plaintiff states that only after so doing was he provided with the contact information for the Co-op's reviewing architect/engineer, but even so, the Co-op has declined to provide a timeline for its review of plaintiff's proposed renovations.

Plaintiff alleges that, in the meantime, the Co-op has ignored Greenberg's violations, including: (1) the use of rubber pavers to cover his terrace, which allegedly do not meet the fire code, exceed the weight limit for such coverings, and cause the parapets to be below the legal minimum height; (2) improper use of a rubber gas hose to connect his barbeque grill, which is a fire code violation; (3) the use of aluminum awning, which pose a hazard in high winds; and (4) the use of an automated drip watering system for his plantings, which the board has refused to grant plaintiff.

In response to plaintiff's concerns, by letter dated September 26, 2018, the Board stated that it was in the "process of engaging an engineer to evaluate the condition of [Greenberg's] terrace." PAC, exhibit E. In an email dated October 25, 2018, the Board stated that, "[t]o the extent there [were] issues with the Greenbergs' compliance with the Terrace Standards and/or applicable Building and Fire Codes, they [were] being dealt with . . . ." *Id.*, exhibit F. However, plaintiff alleges that, "[d]espite numerous requests/demands by Plaintiff to enforce the Roof/Terrace Standards against Greenberg" (*id.*, ¶ 52) and "over five years of promises to the contrary, upon information and belief, the Defendant has willingly failed and refused to force Board member Greenberg to comply with the Roof/Terrace Standards." *Id.*, ¶ 48.

Plaintiff also claims that the Co-op has given favorable treatment to "shareholder lessees of apartments on the C-Line (those units on the southeast corner of floors 2-17)," by permitting them "to renovate, store personal effects and exclusively use the vestibule areas which are . . . part of the common hallways," while simultaneously denying plaintiff exclusive use of the Roof above the Apartment. *Id.*, ¶ 58. In addition, plaintiff alleges that photos (*see id.*, exhibit A) demonstrate that the prior shareholder/lessee of the Apartment regularly used the Terrace as an outdoor entertainment area prior to the Co-op's repairs and installation of the roof membrane. He states that, in denying plaintiff similar use of the Terrace, the Co-op is engaging in unfair treatment.

Lastly, plaintiff alleges that the Co-op has refused to repair the roof membrane so that he can install a suitable covering to make the Terrace useable. Plaintiff points to the September 26, 2018 letter as the Co-op acknowledgement that it bears the responsibility for such repairs. In pertinent part, the letter states that:

> "3. It seems that you have a misimpression about responsibility for the costs of repairs and maintenance of the items which you cite. Repairs and maintenance of the parapets, roof water tower and elevator mechanicals, as well as the underlying structure of the terraces, are the responsibility of the cooperative (to the extent that the repairs and/or maintenance are not necessitated by the actions/inactions of a shareholder) and are paid from the common funds of the cooperative. . . .
>
> "4. The Board does not require you to make any alterations to the terrace area appurtenant to PHA. To be clear, 'alterations' in this case means changes to the terrace surface, parapet walls, and other components that form part of the physical plan of the building. . . .
>
> "5. Should the building's engineer determine that leaks in other units stem from problems with the structure of the terrace (and have not been caused by the use of the terrace by you, Margaret or the occupants of PHB), the cost of repairs will be paid by the cooperative."

*Id.*, exhibit E. Plaintiff alleges that despite "know[ing] about significant pooling of water on the Terrace membrane since 2013, apparently caused because the Terrace surface is pitched away from the drains," the Co-op has not repaired this condition, which has recently resulted in leaks to the apartments directly below. *Id.*, ¶ 66

Plaintiff now seeks leave to amend the complaint to add the following proposed claims: (1) a claim under Article 78 for a declaration that the Co-op breached the Lease in denying plaintiff exclusive use of the Roof; (2) a declaration that the Co-op is obligated to maintain the three Terrace Doors and to repair the Terrace membrane; (3) a claim for violation of Business Corporation Law (BCL) § 501, based on the Co-op's alleged unequal treatment of plaintiff compared with other shareholders holding the same class of shares; (4) a claim for breach of the Lease, based on the Co-op's refusal to acknowledge that the Plaintiff has exclusive use of the Roof and its failure to provide Plaintiff with a Terrace that is capable of being covered and converted into a habitable area, as well as for attorney's fees, pursuant to paragraph 28 of the Lease and Real Property Law § 234; and (5) a derivative claim based on the Co-op's alleged failure to require Greenberg to correct the dangerous conditions on his Terrace.

III. Analysis

The Co-op contends that plaintiff's motion for leave to amend the complaint should be denied, because the motion is made nearly five years after the lawsuit was commenced, after paper discovery—related solely to responsibility for the Terrace Doors—has been completed. In addition, it argues that the motion should be denied, because the proposed claims lack merit for a variety of reasons, including that they: are contradicted by the plain language of the Lease; are

barred by law of the case; impermissibly commingle direct and derivative claims; seek relief under an incorrect cause of action; and fail to allege that plaintiff made a demand on the Co-op prior to bringing a derivative claim. Plaintiff counters that the proposed claims are the result of developments in the case following the Decisions and that the proposed claims have merit.

Pursuant to CPLR 3025 (b) "[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court." "A motion for leave to amend the complaint pursuant to CPLR 3025 (b) should be freely granted unless the proposed amendment is palpably insufficient to state a cause of action or is patently devoid of merit." *Bishop v Maurer*, 83 AD3d 483, 485 (1st Dept 2011) (internal quotation marks and citations omitted). However, "some merit should be shown or valid reason advanced where there has been unreasonable delay in moving for the relief sought." *Leslie Sue Flowers Corp. v J. M. Fields, Inc.*, 55 AD2d 867, 867 (1st Dept 1977); *see also Sutton Apts. Corp. v Bradhurst 100 Dev. LLC*, 160 AD3d 508, 509-510 (1st Dept 2018) (finding that a motion to amend "was also appropriately denied in light of plaintiffs' long delay, which they [did] not adequately explain, and which occurred notwithstanding that the facts and issues that under[lay] the proposed amendments were known to them from the outset of the case").

A. CPLR Article 78 Proceeding (First Proposed Claim)

Under the first proposed claim, plaintiff seeks to challenge the Co-op's determination that plaintiff does not have an exclusive right to the Roof. Plaintiff relies on: (1) paragraph 7 of the Lease; (2) the 1999 Board Minutes; (3) the Co-op permitting him to install his own mechanical systems on the Roof; and (4) the Co-op agreeing to provide prior notice when its staff enter the area.

"[A] lease is subject to the rules of construction applicable to any other agreement." *George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 217 (1978). Accordingly, a clear and unambiguous document on its face "must be enforced according to the plain meaning of its terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous." *Banco Espírito Santo, S.A. v Concessionária Do Rodoanel Oeste S.A.*, 100 AD3d 100, 106 (1st Dept 2012); *see also 1009 Second Ave. Assoc. v New York City Off-Track Betting Corp.*, 248 AD2d 106, 107-108 (1st Dept 1998).

Here, the Lease provides that, "[i]f 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 . . . ." PAC, exhibit B, ¶ 7. Contrary to plaintiff's contention, "terrace" and "that portion of the roof appurtenant to the penthouse" are not intended to refer to different areas of the roof. Rather, they unambiguously refer to the area of the roof that is level with the floor of the penthouse. Courts have repeatedly interpreted nearly identical language in this way and nothing in the Lease calls for a different interpretation. *See Rose v 115 Tenants Corp.*, 150 AD3d 472, 472 (1st Dept 2017) (finding that "[t]he motion court correctly found that the plain language of relevant provisions in the parties' proprietary lease and the offering plan . . . conveyed to plaintiffs. . . an exclusive right to use and enjoy the rooftop terrace to the extent any portion thereof was appurtenant to their penthouse"); *Gracie Terrace Apt. Corp. v Goldstone*, 103 AD2d 699, 700 (1st Dept 1984) (interpreting nearly

identical language to find that that the portion of the roof directly adjoining the penthouse's upstairs bedroom was allocated exclusively to the penthouse occupants); *Huyck v 171 Tenants Corp.*, 2018 NY Slip Op 33026(U), *9, *17 (Sup Ct, NY County 2018) (finding that, pursuant to the proprietary lease, plaintiffs were entitled to the "exclusive use of the portion of the rooftop on the level of their penthouse and that [was] appurtenant to their apartment," but not "any space above their apartment"); *Rushmore v Park Regis Apt. Corp.*, 2018 NY Slip Op 31335(U), *9 (Sup Ct, NY County 2018) (interpreting proprietary lease phrases "portion of the roof adjoining a penthouse" and "portion of the roof appurtenant to the penthouse" as "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. . . . not to any roof area on top of the penthouse"). As the Lease is unambiguous, extrinsic evidence of the parties' intentions (*i.e.* the 1999 Board Minutes and the parties' course of dealings) may not be considered. *Banco Espírito Santo, S.A.*, 100 AD3d at 106. Accordingly, the first proposed claim is patently devoid of merit and leave to add the claim to the complaint is denied.

B. Declaratory Judgment (Second Proposed Claim)

Plaintiff seeks a declaration that in addition to maintaining the Terrace Doors, the Co-op is obligated to repair the Terrace membrane to allow it to drain properly and be covered.

"A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract." *Apple Records v Capitol Records*, 137 AD2d 50, 54 (1st Dept 1988).

Contrary to the Co-op's contention, law of the case does not mandate denial of the motion to add the second proposed claim. "Under the doctrine, parties . . . are preclude[d from] relitigating an issue decided in an ongoing action where there previously was a full and fair opportunity to address the issue." *Carmona v Mathisson*, 92 AD3d 492, 493 (1st Dept 2012) (internal quotation marks and citation omitted). Here, the Decisions merely determined that, to the extent plaintiff seeks to make the Terrace habitable, he must undertake the cost of such renovations. The court has made no determination as to who bears responsibility for maintaining the roof membrane.

Nonetheless, the motion to amend to add the second claim must be denied. Plaintiff seeks declaratory relief that is nearly identical to his fourth proposed claim for breach of contract, which seeks damages for the Co-op's alleged "fail[ure] to provide Plaintiff with a Terrace that is capable of being covered and converted into a habitable area." PAC, ¶ 88. As plaintiff has an adequate alternative remedy, "declaratory judgment is unnecessary and inappropriate." *Apple Records, Inc.*, 137 AD2d 54. To the extent the proposed second claim concerns the Terrace Doors, that claim remains in the action and the proposed claim is duplicative. Therefore, no need for an amendment exists. As such, leave to amend the complaint to add the second proposed claim is denied.

C. BCL § 501 (c) (Third Proposed Claim)

Plaintiff claims that by failing to enforce the provisions set forth in the Roof/Terrace Standards against Greenberg, by construing the Lease's right to exclusive possession more liberally as to C-line shareholder/lessees and by allowing the prior shareholder/lessee of the Apartment extensive use of the Roof and Terrace areas without hindrance, the Co-op is treating plaintiff unequally and differently than other shareholders who hold the same class of shares, in violation of BCL § 501 (c).

BCL§ 501 (c) provides that "each share shall be equal to every other share of the same class." In the context of a cooperative building, this "requires parity of rights granted to shareholders by the lease or bylaws." *Pilipovic v Laight Coop. Corp.*, 137 AD3d 710, 711 (1st Dept 2016). Thus, to state a claim under BCL§ 501 (c), plaintiff must allege "that the terms of their lease or shares are . . . different from those of the other shareholders." *Moltisanti v East Riv. Hous. Corp.*, 149 AD3d 530, 532 (1st Dept 2017). Merely alleging that plaintiff was denied the right to make alterations to his unit granted to other shareholders, even if true, "is not the type of differential treatment that Business Corporation Law § 501 (c) was designed to address." *Id.* (dismissing BCL§ 501 [c] claim where plaintiffs alleged that "they alone were not permitted to construct an enclosure without first obtaining defendant's written permission").

Here, plaintiff fails to allege that his rights under the Lease, the bylaws or the Roof/Terrace Standards are different from other shareholders. Instead, he merely alleges that other shareholders received more lenient treatment from the Board when they sought to make alterations or to make use of their terraces. As "this is not the type of differential treatment that Business Corporation Law § 501 (c) was designed to address" (*id.*), plaintiff's proposed third cause of action is palpably insufficient and leave to amend must be denied.

Notably, plaintiff's reliance on *Isaksson v The Board of Directors of 280 Mott St. Hous. Dev. Fund Corp.* (2017 NY Slip Op 32589[U] [Sup Ct, NY County 2017]), to argue that BCL § 501 (c) applies to unequal treatment of shareholders, whether or not that unequal treatment is codified in the lease, is misplaced. The court in that case never reached "the BCL issues," having dismissed the claim as time-barred. *See id.* at *21.

D. Breach of Lease (Fourth Proposed Claim)

Plaintiff claims that the Co-op breached the Lease when it refused to acknowledge that he has exclusive rights to the use of the Roof and failed to provide him with a Terrace that could be covered and converted into a habitable area. Plaintiff also seeks attorney's fees, pursuant to paragraph 28 of the Lease and Real Property Law § 234.

To the extent the claim is based on the Co-op's failure to acknowledge plaintiff's exclusive right to the Roof, the claim is devoid of merit. As discussed above, the Lease unambiguously grants plaintiff the exclusive use of the Terrace only.

To the extent the claim is based on the Co-op's failure to deliver a Terrace that can be converted into a habitable area, plaintiff states a meritorious claim. Law of the case does not bar this claim. As discussed above, while the court has previously held that the Co-op is not obligated to provide plaintiff with a habitable Terrace, it never made any determination as to the Co-op's responsibility for maintaining the roof membrane. Plaintiff now alleges that the Co-op

installed the membrane incorrectly, causing water to pool on the membrane and resulting in leaks. He also submits evidence that the Co-op has acknowledged its responsibility to repair leaks stemming from the "the structure of the terrace" (*see* PAC, exhibit E). Thus, to the extent plaintiff alleges that the Co-op has refused to correct structural issues with the Terrace's roof membrane, he states a meritorious breach of contract claim.

Nor does plaintiff's delay in seeking to amend the complaint to add this claim require denial of the motion. While plaintiff was aware of the "significant pooling of water on the Terrace membrane since 2013" (*id.*, ¶ 66), it appears that his long delay in seeking to amend the complaint was due to his "misimpression about responsibility for the costs of repairs and maintenance" (*id.*, exhibit E) of such issues. These misimpressions were dispelled by the September 26, 2018 letter from the Co-op. Therefore, to the extent plaintiff seeks leave to amend the complaint to add a breach of contract claim based on the Co-op's failure to provide a structurally sound Terrace, and for the attendant attorneys' fees, the motion is granted.

E. Derivative Claim (Fifth Proposed Claim)

Plaintiff seeks to compel the Co-op to enforce the Terrace/Roof Standards and various regulations against Greenberg, which the Co-op has allegedly refused to do despite numerous demands.

Pursuant to BCL § 626 (c), a plaintiff shareholder bringing a derivative action must "set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort." *See Tomczak v Trepel*, 283 AD2d 229, 230 (1st Dept 2001) (affirming dismissal of derivative claim where "the complaint provide[d] no indication as to who made the demands, when they were made, which Board members they were made to, the content of the demands or why the Board refused to take action"). In addition, "[a] complaint the allegations of which confuse a shareholder's derivative and individual rights will . . . be dismissed." *Abrams v Donati,* 66 NY2d 951, 953 (1985).

> "In order to distinguish a derivative claim from a direct one, the court considers (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders individually). If there is any harm caused to the individual, as opposed to the corporation, then the individual may proceed with a direct action. On the other hand, even where an individual harm is claimed, if it is confused with or embedded in the harm to the corporation, it cannot separately stand."

*Serino v Lipper*, 123 AD3d 34, 40 (1st Dept 2014) (internal quotation marks and citations omitted).

Here, contrary to the Co-op's contention, the proposed fifth cause of action does not impermissibly commingle plaintiff's derivative and direct claims. It alleges that the Co-op "has failed and refused to compel Greenberg to correct the dangerous conditions on his Terrace"

(PAC, ¶ 95) and that "[t]he dangerous conditions created by Greenberg effect [sic] all of the shareholders of the [Co-op]." *Id.*, ¶ 96. These allegations pertain to the harm suffered by all of the Co-op's shareholders, not just plaintiff in his individual capacity. Therefore, they state a derivative claim. *See Serino*, 123 AD3d at 40.

Nonetheless, leave to amend the complaint to add the fifth proposed claim must be denied. Nowhere in the complaint, or plaintiff's affidavit in support of the motion, does plaintiff "set forth with particularity" (BCL § 626 [c]) that he demanded that the Board act. Instead, the proposed complaint only contains vague allegations of "numerous requests/demands by Plaintiff to enforce the Roof/Terrace Standards against Greenberg." PAC, ¶ 52; *see also id.*, ¶ 94 ("despite due demand on numerous occasions"). Plaintiff attempts to correct this oversight in his reply affidavit, providing copies of several demand letters he sent to the Board. *See* Musey reply aff, exhibit A. However, such additional submissions on reply are improper. *See Schulte Roth & Zabel, LLP v Kassover,* 28 AD3d 404, 405 (1st Dept 2006).[1] Therefore, to the extent plaintiff seeks leave to amend the complaint to add the fifth proposed cause of action, the motion is denied.

Accordingly, it is hereby

ORDERED that the plaintiff's motion for leave to amend the complaint is granted, in part, to the extent that plaintiff seeks to add a breach of contract claim based on the defendant's failure to provide the plaintiff with a Terrace that is capable of being covered and converted into a habitable area, and the motion is otherwise denied; and it is further

ORDERED that the plaintiff is directed to file and serve an amended complaint consistent with this decision; and it is further

ORDERED that the defendant shall answer the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that counsel are directed to appear for a status conference in Part 7 of this court, Room 345, 60 Centre Street, on August 14, 2019, at 10 a.m.

6/21/2019
DATE

GERALD LEBOVITS, J.S.C.

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|---|---|---|---|---|---|---|---|
| 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 |

[1] Just as the court declines to consider new evidence submitted for the first time in reply, the court declines to consider any of the arguments and submissions contained in the parties' letters to court, which constitute impermissible sur replies. *See* NYSCEF document numbers 250-252; CPLR 2214 (c).