SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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RICHARD STOLZMAN,

Plaintiff,

- v -

210 RIVERSIDE TENANTS, INC.,

Defendant.

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INDEX NO. 651058/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 01, 02, 03, 04, 05, 06, 07, 08, 09, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61

were read on this motion to DISMISS.

Armstrong Teasdale LLP, New York, NY (Thomas V. Juneau, Jr. of counsel), for plaintiff.
Braverman Greenspun PC, New York, NY (Maria Boboris and Manu Davidson of counsel), for defendant.

Gerald Lebovits, J.:

Plaintiff, Richard Stolzman, owns the shares allocated to an apartment in 210 Riverside Drive, a cooperative-apartment building. Defendant, 210 Riverside Tenants, Inc. (Riverside), is the cooperative corporation that owns the building. Stolzman and Riverside dispute the scope of Stolzman's rights under a license granted by Riverside to use space on the roof of the building for an air-conditioning unit. This dispute has impaired Stolzman's ability to sell his apartment, as he wishes to do.

Stolzman has sued Riverside for breach of the proprietary co-op lease, breach of the license agreement, and tortious interference with prospective business relations. Riverside now moves to dismiss under CPLR 3211. Stolzman cross-moves under CPLR 3001 for a declaratory judgment in his favor.

BACKGROUND

According to the allegations of the complaint, Stolzman owns a unit in the Riverside building under a proprietary lease between Stolzman and Riverside. The unit, apartment, 12F, is located on the top floor of the Riverside building. The apartment is air-conditioned through a unit located above on the building's roof. (*See* NYSCEF No. 23 [photograph of unit].) That air-conditioning unit was installed there in 1991 by Stolzman's predecessor lessee in apartment 12F, under the terms of a license agreement between that lessee and Riverside. (*See* NYSCEF No. 38 [license agreement].)

The license agreement applies to "approximately 20 square feet of roof space . . . located immediately above" apartment 12F. (*Id.* at 1.) As originally executed, the agreement applies for a renewable "term of ten years . . . and for so long [a]s you hold title to the Lease and the shares of Owners allocated to the Apartment." (*Id.* at ¶ 1; *see also id.* at ¶ 5 [providing for renewal of the license].) During that term, the lessee could "use the space for the installation of an air conditioning unit . . . serving the Apartment, and for no other purpose." The lessee is required to "make and maintain such installation in accordance with all applicable legal requirements." (*Id.*) The lessee paid the building $1,250 at execution as consideration for the license (*see id.* at ¶ 5).

In 2002, Stolzman's predecessor lessee and Riverside amended the license agreement. The amendment extended the right to use the designated roof space to the lessee's "successors and assigns to the Proprietary Lease and the cooperative shares allocated to the Apartment," in addition to the lessee himself. (NYSCEF No. 39 at 1.) Under the agreement as amended, the lessee and his successors (like Stolzman) "may use the [roof] Space for an air-conditioning unit . . . serving the Apartment, and for no other purpose." (*Id.*) This right "shall be deemed appurtenant to ownership of the Proprietary Lease and cooperative shares allocated to the Apartment and shall be deemed irrevocable except as expressly provided elsewhere in the Letter Agreement." (*Id.*) In exchange, the lessee or successors must pay $85 per month in additional maintenance, which shall increase from time to time in proportion to maintenance increases made by Riverside in the building generally. (*See id.*)

Stolzman now wishes to sell his apartment, but has experienced difficulty in doing so. This difficulty stems from the fact that the air-conditioning unit, now 30-years-old, will need replacing in the near future. Riverside has taken the position that the current license agreement does not extend to replacement of the air-conditioning unit (as opposed to use of the existing unit). Riverside will permit Stolzman or any buyer of the apartment to replace the unit only upon execution of a new license agreement with terms more favorable to Riverside than the current agreement. (*See* NYSCEF No. 44 [proposed agreement].) Riverside's restrictive position on replacement of the air-conditioning unit has cost Stolzman several otherwise-satisfactory buyers.

Stolzman sued Riverside, seeking (i) a declaratory judgment that he has the right to replace the air-conditioning unit under the current license agreement; (ii) damages for breach of the proprietary lease and the license agreement; and (iii) injunctive relief requiring Riverside to permit him to replace the unit.

Riverside now moves to dismiss the complaint in its entirety under CPLR 3211 (a) (1) and (a) (7). Stolzman cross-moves under CPLR 3001 for a declaration that he may replace the air-conditioning unit under his current license.

DISCUSSION

Dismissal of a complaint or cause of action under CPLR 3211 (a) (1) is warranted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as matter of law," (*Goshen v Mutual Life Ins., Co. of NY*, 98 NY2d 314, 326 [2002]), and "conclusively disposes of the plaintiff's claim." (*Fortis Fin. Servs., LLC v*

Fimat Futures USA, 290 AD2d 383, 383 [1st Dept 2002].) Dismissal under CPLR 3211(a) (7) is appropriate when the complaint, accorded "the benefit of every possible favorable inference" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]), lacks "any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

I. The Branch of Riverside's Motion Seeking to Dismiss Stolzman's Declaratory-Judgment Claim

Riverside moves to dismiss Stolzman's request for declaratory judgment, arguing this cause of action is duplicative in that it seeks a declaration of the same rights at issue in Stolzman's breach of contract claim. This court agrees.

A cause of action for a declaratory judgment is "unnecessary and inappropriate" when the plaintiff has an adequate, alternative remedy in another form, such as a breach of contract claim, that addresses the same rights and obligations. (*Apple Records, Inc. v Capitol Records, Inc*., 137 AD 2d 50, 54 [1st Dept 1988].) Here, both Stolzman's declaratory-judgment claim and his breach-of-contract claim go to whether he is permitted by the license agreement to replace the existing air conditioning unit. A determination on the contract claim will alone sufficiently guide the parties in their future conduct with respect to the license agreement. (*See 204 Columbia Heights, LLC v Manheim*, 148 AD3d 59, 70 [1st Dept 2017].)

Stolzman correctly notes that the presence of other alternative remedies does not require dismissal of a request for declaratory relief. (*See* NYSCEF No. 54 at 15-16.) But this court retains discretion to dismiss a declaratory-judgment claim if—as here—other adequate remedies exist. (*Subdivisions, Inc. v Town of Sullivan*, 86 AD3d 830, 832 [3d Dept 2011].)

II. The Branch of Riverside's Motion Seeking to Dismiss Stolzman's Breach-of-Contract Claim

Riverside seeks to dismiss both Stolzman's claim for alleged breach of the proprietary lease and his claim for alleged breach of the license agreement. This court agrees that Stolzman has failed to state a cause of action for breach of the lease. But the court declines at this stage of the litigation to dismiss Stolzman's claim for breach of the license agreement.

A. The claim for breach of the lease

Stolzman's breach-of-lease claim is based principally on § 21 (a) of the proprietary lease. But he has not established for pleading purposes that this lease provision applies here.

Section 21 (a) governs the terms under which a lessee may make alterations "in the Apartment or Building, or on any roof, penthouse, terrace or balcony appurtenant thereto." (NYSCEF No. 59 at 18.) The lease defines "Apartment" to include a set of designated rooms in the building, and "any . . . roof, or portion thereof outside of said partitioned rooms, which are allocated exclusively to the occupant of the Apartment." *(Id.* at 5.) The air-conditioning unit obviously is not located within Stolzman's designated rooms in the building. And Stolzman does not allege that the co-op offering plan allocated the portion of roof space at issue here

exclusively to his apartment. Nor does the record contain a copy of the offering plan. (*Cf. Fairmont Tenants Corp. v Braff*, 162 AD3d 442, 442 [1st Dept 2018] [using offering plan to resolve ambiguity about whether roof space was allocated exclusively to a co-op shareholder].) Stolzman also does not allege that the roof space at issue here was "appurtenant" to apt 12F within the meaning of the lease. Indeed, if the roof space *were* part of Stolzman's apartment itself under the lease (whether through being allocated exclusively to the apartment or as a space appurtenant thereto), Stolzman's predecessor presumably would not have needed to obtain a license from Riverside to use that space.

Thus, on this record Stolzman has not identified a provision of the proprietary lease that is both applicable here and (allegedly) breached by Riverside.[1] Riverside's motion to dismiss Stolzman's claim for breach of the lease is granted.[2]

B. The claim for breach of the license agreement

Stolzman also claims that Riverside breached the separate license agreement covering the placement of Stolzman's air conditioning unit on the building roof. As discussed above (*see* Background, *supra*), this agreement provides that in exchange for a fee, Stolzman "may use the Space for an air-conditioning unit . . . serving the Apartment, and for no other purpose."[3] And he is required to "maintain such Air Conditioning in accordance with all applicable legal requirements." (*See* NYSCEF No. 39 at 1 [amendments to agreement]; *see* NYSCEF No. 38 at 1 [agreement as originally executed].)

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[1] This court therefore does not reach Riverside's arguments that Stolzman's breach-of-lease claim is foreclosed by § 7 of the lease (governing penthouses), § 21 (b) (governing removal of fixtures), or § 13 of the lease (incorporating the co-op's "House Rules"). (*See* NYSCEF No. 59 at 9, 11, 19.) The court notes, though, that these arguments run into a similar problem as Stolzman's reliance on § 21 (a). Section 7 of the lease applies to "portion[s] of the roof adjoining a penthouse." There is no indication in the record that Stolzman's apartment is a penthouse. Section 21 (b) of the lease applies only to Stolzman's "Apartment" and thus may not apply here at all, for the reasons given above. (NYSCEF No. 59 at 19.) With respect to the House Rules, the parties go back and forth about length about which edition of the House Rules applies and whether it binds Stolzman. Even assuming the rules do bind Stolzman, the rules that Riverside relies upon govern "Apartment Renovations" and alterations. (NYSCEF No. 59 at 45 [2010 House Rules]; *compare* NYSCEF No. 37 at 4 [2018 House Rules].) Riverside does not attempt to establish that the roof space covered by the license agreement counts as part of Stolzman's "apartment" for purposes of this rule.

[2] Stolzman's cause of action for injunctive relief also is dismissed to the extent that it is based on a claim that Riverside breached the proprietary lease.

[3] The license agreement as originally executed in 1991 provided that Stolzman's predecessor tenant could "use the space for the installation of an air conditioning unit." (*See* NYSCEF No. 38 at ¶ 1.) The 2002 amendment to the agreement removed the language about installation. (*See* NYSCEF No. 39 at 1.)

The license agreement does not, however, contain any language addressing the issue of *replacement* of the air-conditioning unit (as distinct from installation, use, or maintenance of the unit). The question for this court is what to make of this silence.

Riverside contends that the answer is clear: The "absence of any language affirmatively permitting the replacement" of the existing unit . . . clearly evinces the parties' intention that the License Agreement only address" Stolzman's "rights to house the Existing AC Unit in the Space—and not his rights to replace it." (NYSCEF No. 61 at 5.) This court is not so sure.

As Stolzman points out (*see* NYSCEF No. 54 at 14), the amended license agreement does not refer to the "existing" air-conditioning unit, or otherwise specifically identify the air-conditioning unit that the lessee may house on the roof under the agreement. (*See* NYSCEF No. 39 at 1.) Instead it provides that the lessee may use the space for "*an* air-conditioning unit." (*Id.* [emphasis added].)

Riverside's interpretation also runs counter to other changes made by the 2002 amendment to the agreement. As originally drafted, the agreement ran only for a (renewable) ten-year term; and appears to have given only the lessee-signatory, in particular, the right to use the space for an air-conditioning unit. (*See* NYSCEF No. 38 at ¶ 1 [permitting "you" to "use the space" for an air-conditioning unit "[f]or a term of 10 years from the date of this agreement and for so long as you hold title to the Lease and shares of Owners allocated to the Apartment"].) As amended, on the other hand, the agreement grants permission to "the Lessee and Lessee's successors and assigns to the" lease and cooperative shares to "use the Space for an air-conditioning unit" for an open-ended period. It also provides that the "rights granted under this Letter Agreement" are not only appurtenant to ownership" of the lease and shares, but "*irrevocable*" except as otherwise expressly provided. (NYSCEF No. 39 at 1.)

Thus, on Riverside's reading, the co-op and the then-lessee chose in 2002 to amend the agreement to now confer an open-ended, irrevocable right on the lessee and his successors to use the roof for an air-conditioning unit; but also impliedly limited the scope and duration of that right to the life of the existing, ten-year-old unit.[4] This reading is somewhat self-contradictory and, on the present record, not wholly persuasive. To be clear, this court does not mean to rule out the possibility that Riverside's interpretation will ultimately prove to be stronger than Stolzman's. But at a minimum it is not the *only* viable interpretation at the pleading stage, as Riverside would have it in moving to dismiss under CPLR 3211. Riverside's motion to dismiss the breach-of-license claim is denied.[5]

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[4] Given the amendment's expansion of the scope of the license being granted by the co-op, this court is not persuaded by Riverside's argument that the amendment's removal of "installation" from the purposes for which the lessee could use the roof space *necessarily* demonstrates that the license was limited to using the existing air-conditioning unit. (*See* NYSCEF No. 46 at 14-15.)

[5] Should Stolzman ultimately prevail on this breach-of-contract claim, though, this court's "determination of [that] claim will sufficiently guide the parties on their future performance of the contract," thereby "obviating any need for other alternative relief," such as the requested permanent injunction. (*204 Columbia Heights, LLC*, 148 AD3d at 70-71 [1st Dept 2017]

The court notes one other point relating to the license agreement, for the guidance of the parties going forward. In opposing the motion to dismiss, Stolzman specifically disclaims any intention of seeking "the right to 'by-pass' provisions of the Proprietary Lease applicable to alterations," and concedes that he (or perhaps a successor lessee) should be required to obtain Riverside's consent for a plan to replace the existing air-conditioning unit.[6] (NYSCEF No. 54 at 15; *id.* at 19 [citing § 21 [a] of the lease].) To be sure, as Stolzman emphasizes, the board must not unreasonably withhold or delay its consent. (*See* NYSCEF No. 54 at 19.) At the same time, as *Riverside* emphasizes (*see* NYSCEF No. 61 at 7-8), Stolzman must provide Riverside with a sufficiently detailed plan for replacing the existing unit to enable the board to make a reasonable, informed decision about whether to grant or withhold its consent. (*See Chapman v 2 King St. Apts. Corp.*, 2005 NY Slip Op 51294[U], at *9 [Sup Ct, NY County Aug. 12, 2005].)

III. The Branch of Riverside's Motion Seeking to Dismiss Stolzman's Claim for Tortious Interference is Proper

Riverside contends that Stolzman's fourth cause of action should be dismissed for failure to state a claim for tortious interference with prospective business relations. This court agrees.

To state a tortious-interference claim, plaintiffs must allege that (1) they had business relations with a third party; (2) the defendant interfered with those business relations; (3) the defendant acted with the sole purpose of harming plaintiffs or by using unlawful means; and (4) there was resulting injury to the business relationship. *(Thome v Alexander & Louisa Calder Found*., 70 AD3d 88, 108, [1st Dept 2009].) Here, Stolzman has not established for pleading purposes that Riverside acted with the sole purpose of harming him or by using unlawful means.

Stolzman's complaint alleges that Riverside is seeking to pressure him into signing the proposed license agreement, which would narrow the scope of the license to use an air-conditioning unit and impose significant conditions on the unit's replacement. (*See* NYSCEF No. 44 [proposed agreement].) But Stolzman does not allege that Riverside is exerting this pressure for the sole purpose of *harming Stolzman*, as opposed to benefitting Riverside by obtaining more desirable terms for licensing the right to use the building's roof. (*See Calder Foundation*, 70 AD3d at 108 [affirming dismissal of tortious-interference claim where plaintiff alleged that "defendants acted with the intent of benefitting themselves," rather than "with the sole purpose of harming" plaintiff].) And Riverside is alleged to have directed wrongful economic pressure only at Stolzman himself, rather than at his prospective buyers. (*See Arnon ltd. v Beierwaltes*, 125 AD3d 453, 454 [1st Dept 2015] [affirming dismissal of tortious-interference counterclaim where alleged wrongful conduct was directed at counterclaimants, as opposed to counterclaimants' customers].)

[internal quotation marks omitted].) Since Stolzman has an adequate remedy at law, he is not entitled to obtain injunctive relief based on his breach-of-license claim.

[6] Indeed, it would make little sense to say that under the license agreement Stolzman could proceed unilaterally to replace the air-conditioning unit on the building's roof without the building owner's involvement or consent.

Riverside's motion to dismiss Stolzman's tortious-interference claim is granted.

IV. Stolzman's Cross-Motion for Declaratory Judgment

For the reasons discussed above, Stolzman's cross-motion for declaratory judgment is denied as duplicating his surviving breach-of-contract claim relating to the license agreement. (*See* Point I and Section II.B, *supra*.)

Accordingly, it is hereby

ORDERED that the branches of defendant's motion under CPLR 3211 seeking dismissal of Stolzman's declaratory-judgment claim, injunctive-relief claim, tortious-interference claim, and claim for breach of the proprietary lease are granted; and it is further

ORDERED that the branch of defendant's motion under CPLR 3211 seeking dismissal of Stolzman's claim for breach of the license agreement is denied; and it is further

ORDERED that Stolzman's cross-motion under CPLR 3001 for a declaratory judgment in his favor is denied.

HON. GERALD LEBOVITS
J.S.C.

8/312020
DATE

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