162 A.D.3d 442
Supreme Court, Appellate Division,
First Department, New York.

FAIRMONT TENANTS
CORP., Plaintiff–Respondent,
v.
Michael BRAFF, Defendant–Appellant,
Gladys Wanich, Defendant.

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Decided June 7, 2018

Synopsis

Background: Tenants' cooperative brought action against owners of shares of two apartment units in building seeking to enjoin owners from using roof adjacent to their units. The Supreme Court, New York County, Melissa Crane, J., 2017 WL 4517767, granted cooperative's motion for summary judgment and denied owners' motion for summary judgment. Owners appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] examination of extrinsic evidence was necessary to determine whether owners had right to use roof;

[2] owners were not entitled to use roof;

[3] cooperative's failure to keep owners from using roof did not constitute waiver of the right to exclude them;

[4] owners did not obtain right to use roof through adverse possession; and

[5] cooperative was entitled to injunctive relief from owners' use of roof.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Permanent Injunction; Motion for Summary Judgment.

West Headnotes (5)

[1] Evidence Grounds for admission of extrinsic evidence

Examination of extrinsic evidence was necessary to determine whether owners of shares allocated to two units in apartment building had right to use roof of building, where owners' proprietary leases defined the apartments to include any roof "which [was] allocated exclusively to the occupant of the apartment," but did not make clear whether the disputed roof area had been exclusively assigned to owners.

1 Cases that cite this headnote

[2] Common Interest Communities Unit boundaries

Owners of shares allocated to two units in apartment building were not entitled to use roof adjacent to their units, pursuant to proprietary lease, which defined the apartment to include the roof that was "allocated exclusively to the occupant of the apartment," and pursuant to offering plan that converted building to cooperative ownership and allocated shares, which made clear that there was no outdoor space allocated exclusively to owners' apartments.

1 Cases that cite this headnote

[3] Common Interest Communities Documents recognizing unit ownership or right of possession; proprietary leases

Common Interest Communities Unit boundaries

Tenants' cooperative's failure to keep owners of shares of two units in apartment building from using roof that was not allocated exclusively to them did not constitute waiver of the right to exclude them, despite fact that cooperative had knowledge of owners' use of roof, as proprietary lease had unambiguous no-waiver clause.

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[4] **Adverse Possession** Possession exclusive of others

Use of apartment building's roof by owners of shares of two apartment units in building was not exclusive, and thus owners did not obtain right to use roof through adverse possession, where owners had permitted workmen on the roof and had given access to the roof to building staff from time to time.

[5] **Injunction** Trespass or Other Injury to Real Property

Tenants' cooperative suffered irreparable injury to its property rights from the continued trespassing on roof of building by owners of shares of two apartment units in building, and thus was entitled to injunctive relief from owners' use of roof.

Attorneys and Law Firms

****40** Michael Braff, New York, appellant pro se.

Boyd Richards Parker Colonnelli, P.L., New York (Jennifer L. Stewart of counsel), for respondent.

Manzanet–Daniels, J.P., Tom, Andrias, Kapnick, Singh, JJ.

Opinion

***442** Order, Supreme Court, New York County (Melissa Crane, J.), entered on or about October 10, 2017, which granted plaintiff coop's motion for summary judgment, denied defendant Braff's motion for summary judgment, and declared that plaintiff has right, title, and interest to the roof adjacent to apartments 2F and 2G, and enjoined defendants from occupying or using that space, unanimously affirmed, with costs.

[1] **[2]** There are no issues of fact requiring a trial. The proprietary lease defines the apartment as "the rooms in the building as partitioned on the date of the execution of this lease designated by the above-stated apartment number, together with their appurtenances and fixtures and any closets, terraces, balconies, roof, or portion thereof outside of said partitioned rooms, *which are allocated exclusively to the occupant of the apartment*" (emphasis added). This clause is ambiguous because it is unclear from the lease whether the disputed roof area has been exclusively assigned to defendants. As such, the court properly looked to extrinsic evidence, including the offering plan (*see* *South Rd. Assoc., LLC v. International Bus. Machs. Corp.*, 4 N.Y.3d 272, 277–278, 793 N.Y.S.2d 835, 826 N.E.2d 806 [2005]), which is a "controlling document" that gives the proprietary lease meaning (*see* *Sassi–Lehner v. Charlton* ***Tenants*** *Corp.*, 55 A.D.3d 74, 78–79, 863 N.Y.S.2d 20 [1st Dept. 2008]; *see also Rotblut v. 150 E. 77th St. Corp.*, 79 A.D.3d 532, 532, 914 N.Y.S.2d 22 [1st Dept. 2010]; *Prospect Owners Corp. v. Sandmeyer,* 62 A.D.3d 601, 603, 881 N.Y.S.2d 40 [1st Dept. 2009], *lv denied* 13 N.Y.3d 717, 2010 WL 156723 [2010]; *1050 Fifth Ave. v. May,* 247 A.D.2d 243, 243, 668 N.Y.S.2d 600 [1st Dept. 1998]). The offering plan makes clear that there is no outdoor space allocated exclusively to defendants' apartment.

[3] Supreme Court also properly granted plaintiff summary judgment dismissing defendants' waiver defense and counterclaim. Paragraph 26 of the lease addresses "facilities outside the apartment," and under this provision, the Coop has a revocable license to that area (*see Prospect Owners,* 62 A.D.3d at 602, 881 N.Y.S.2d 40). Further, the coop's knowledge of defendants' use of the roof space does not raise issues of fact regarding the coop's waiver of a right under the lease in light of an unambiguous no waiver clause (*see* ***443** *457 Madison Ave. Corp. v. Lederer De Paris, Inc.*, 51 A.D.3d 579, 859 N.Y.S.2d 135 [1st Dept. 2008]; *Rotblut,* 79 A.D.3d at 532–533, 914 N.Y.S.2d 22).

****41** **[4]** Supreme Court also properly dismissed defendants' adverse possession defense and counterclaim. It is undisputed that defendants have permitted workmen on the roof at issue in 2015, and that they have given access to the roof space to building staff from time to time. Accordingly, the court properly found that defendants' use of the roof space was not "exclusive" for any period of time prior to 2015 (*Keena v. Hudmor Corp.*, 37 A.D.3d 172, 173–174, 829 N.Y.S.2d 471 [1st Dept. 2007]; *see Brand v. Prince,* 35 N.Y.2d 634, 636, 364 N.Y.S.2d 826, 324 N.E.2d 314 [1974]).

[5] Finally, defendants' continued trespassing on the roof space entitles the coop to injunctive relief as the irreparable injury is the interference with the coop's property rights (*see Long Is. Gynecological Servs. v. Murphy,* 298 A.D.2d 504,

504, 748 N.Y.S.2d 776 [2d Dept. 2002]; *see also 1050 Fifth Ave.*, 247 A.D.2d at 243, 668 N.Y.S.2d 600).

All Citations

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