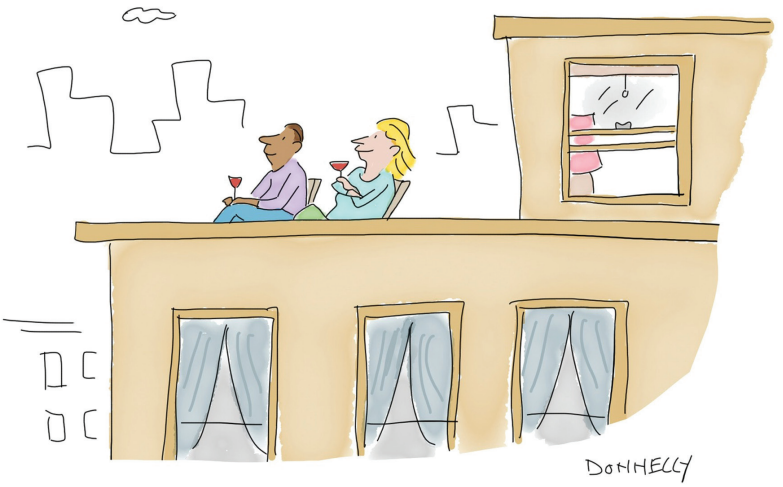
CASE NOTES

# Roof Use … or Abuse?

BY DALE J. DEGENSHEIN




**OUTDOOR SPACE** is perhaps the most valuable commodity in New York City. Some apartment owners look for any way to assert that the area outside their apartment is for their exclusive use. That is just what happened at 401 East 86th Street, and while the case, *Fairmont Tenants Corp. v. Braff,* seems to be about the use of outdoor space, it also reminds us of the relationship between the proprietary lease and the offering plan. In addition, it raises issues about when the plan becomes relevant, which can still happen long after the cooperative has been in place. Finally, the case reminds us that a cooperative has the right to enforce its documents even if it looked the other way for many years.

Michael Braff and Gladys Wanich (Braff) own the shares of Apartment 2FG at Fairmont Tenants Corp. Braff asserted that they had the right to use and occupy the setback portion of the roof adjacent to the apartment. The area was about 10 feet by 20 feet and had a gravel surface. Braff entered it through one of his unit's windows. He apparently had been doing this since the apartment had been purchased in 1989, even though it had never been discussed with the board and no written permission had been given.

The board first raised the issue of the roof in 2007, when it forbade the Braffs from using it and ordered the couple to remove personal items and furniture. Braff insisted that roof use was authorized by the proprietary lease. In 2015, the corporation sued, declaring that the area was not to be used by the Braffs.

The court examined the proprietary lease and offering plan, which identified the apartments in the building, including the number of bedrooms, bathrooms, and share allocations. Specifically, the plan identified with a "T" those apartments with terraces. The offering plan stated that terraces "are access[ible] through a door from the apartment." If a shareholder had access to a terrace, the proprietary lease allowed exclusive use of the terrace, subject to rules and regulations created by the board. The Braff apartment, as identified in the plan, does not have a "T" next to it. Moreover, the offering plan set out the share allocations. Apartment shares increased if the apartment had a terrace. Comparing the Braff apartment to others, it did not appear that the Braffs' share allocation was much larger than similar apartments.

Braff argued that, even in the absence of a "T" next to the share allocation in the offering plan, they were entitled to exclusive use of the setback. He said that, because they had exclusively used the area for more than 10 years, they now owned it. But the court found that Braff did not have exclusive use for that entire period, since the board had gone on to the roof to make repairs.

Finally, Braff claimed the corporation waived its right to challenge his use of the roof. On this point, the court discussed the law of waiver, which is the voluntary relinquishment of a known right. In this case, there was no document waiving the board's rights and no document expressly permitting Braff to use the roof area.

The court determined that Braff had no right to the area, and the corporation's request for an injunction was granted. The appellate court affirmed the lower court's decision.

## Reading the Ruling

This case is a good reminder that boards can successfully challenge a shareholder's actions, even if the shareholder has engaged in an activity that is in violation of the lease for years – even decades. This court found that, given the proprietary lease's "no waiver" provision, the passage of time did not waive the board's right to object. Nor did the board's apparent knowledge of the Braffs' using the roof waive the right to object. The board knew about it in 2007, when it forbade the couple from using the setback.

Also, while the offering plan is probably not an active document anymore, the board and shareholders are still bound by the certificate of incorporation, bylaws, and proprietary lease, all of which can be relevant when trying to determine the rights of the involved parties.

In this situation, the offering plan was the document that identified whether use of outdoor space was permitted by the adjacent shareholder. It showed the intent of the original drafter, and Braff failed to demonstrate that anything set forth in the plan was overridden or modified. The court thus properly considered the terms of the plan as a guide to determine whether or not the outdoor area was for the exclusive use of the Braffs. ■

**ATTORNEYS:**
*For Braff:* he represented himself
*For the corporation:* Boyd Richards Parker Colinelli

*Dale J. Degenshein is special counsel at Stroock & Stroock & Lavan.*