

247 A.D.2d 243, 1998 N.Y. Slip Op. 1362

1050 FIFTH AVENUE, INC., Plaintiff-Respondent,

v.

Monica MAY, Defendant-Appellant.

Supreme Court, Appellate Division, First Department, Feb. 10, 1998.

N.Y.A.D. 1 Dept. 1998.

Steven J. Shore, for Plaintiff-Respondent.

Lawrence P. Eagel, for Defendant-Appellant.

Before MILONAS, J.P., and ROSENBERGER, WILLIAMS and MAZZARELLI, JJ.

#### MEMORANDUM DECISION.

Order, Supreme Court, New York County (Elliott Wilk, J.), entered September 13, 1996, which, in a declaratory judgment action involving whether plaintiff cooperative corporation or defendant tenant/shareholder is the owner of the roof area adjacent to defendant's apartment, upon the parties' respective motions for summary judgment, declined to declare who was the owner of such roof area, unanimously modified, on the law, and upon a search of the record, to declare that plaintiff is the owner of such roof area, and to enjoin defendant from using such area as a terrace, and otherwise affirmed, without costs. Judgment, same court and Justice, entered March 27, 1997, which, insofar as appealed from as limited by defendant's brief, dismissed defendant's first counterclaim, unanimously affirmed, without costs.

There are no issues of fact requiring a trial. Against clear documentary evidence, to wit, the offering plan, building plans and the proprietary lease, showing that the roof area in question is not part of the demised apartment, defendant offers only that it belongs to her because she has been openly and notoriously using it as a terrace for 30 years. This ignores the provision of the proprietary lease that any shareholder use of space outside the shareholder's apartment is pursuant to a revocable license granted by the owner (see, > *Jossel v. Filicori*, 235 A.D.2d 205, 652 N.Y.S.2d 12). In view of the foregoing, defendant's counterclaim for damages is without merit.