At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Binghamton, New York, on the 14th day of May, 2021, conducted by virtual oral argument

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT: COUNTY OF BROOME

KEVIN F. MCDONOUGH and PATRICIA ANN KENNEDY,

Plaintiffs,

-vs.-

DECISION AND ORDER

Index No. EFCA2020001541

50 EAST 96TH STREET, LLC, SUCCESSOR IN INTEREST TO THE RIGHTS OF PAYSON ESTATES INC. and A. RUTH & SONS REAL ESTATE, JOSH RUTH, LEE RUTH and PHILLIP F. RUTH,

Defendants.

APPEARANCES

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EUGENE D. FAUGHNAN, J.S.C.

This matter is before the Court upon the Defendants' motion to dismiss the Plaintiffs' Complaint pursuant to CPLR 3211 (a)(1) and CPLR 3211 (a)(7). The parties appeared for oral argument, which was conducted virtually by Microsoft Teams on May 14, 2021, after which the Court suggested the parties redouble efforts to resolve this matter amicably. Subsequently, the parties informed the Court that they had been unable to reach a resolution, and were seeking a determination on the motion to dismiss. After due deliberation, this Decision and Order constitutes the Court's determination with respect to the pending motion.[1]

BACKGROUND FACTS

In September 2016, Plaintiff, Patricia Ann Kennedy, entered into a Lease agreement with 50 East 96th Street, LLC successor in interest to the rights of Payson Estates, Inc., for an apartment in Manhattan, utilizing a standard lease form. The lease was for a one year term at $4,800 per month and was signed by Plaintiff Patricia Kennedy and was also guaranteed by her father, Plaintiff Kevin McDonough. Kennedy allegedly also paid two months as security deposit. Over the next three years, Kennedy entered into new lease agreements in August of each year. Plaintiffs contend that McDonough was not a guarantor on the subsequent leases, because he did not sign any renewals.

Kennedy was laid off from her employment in approximately June 2017 but continued to receive severance pay until January 2018. In June 2019, General Obligations Law was amended to provide that landlords could only keep one month security deposit (GOL 7-108). Plaintiffs sought to recoup the additional month security deposit to no avail. Due to lack of employment, Kennedy fell behind on rent payments, and the landlord gave her a 14-day notice in December 2019. McDonough provided money to cover rent payments for November and December 2019 and January 2020. Beginning in March 2020, Governor Andrew Cuomo issued numerous Executive Orders due to the coronavirus pandemic, including a moratorium on eviction

[1] All the papers filed in connection with the motion and opposition are included in the NYSCEF electronic case file, and have been considered by the Court.

proceedings. Kennedy attempted to make ongoing rent payments, and also completed COVID hardship forms over the next few months. The Defendants advised Kennedy that they would not be renewing her tenancy at the end of the lease term-September 30, 2020.

On August 6, 2020, Plaintiffs commenced this action by the filing of a Summons and Complaint asserting three causes of action: breach of warranty of habitability, harassment (by virtue of demands for payment), and intentional infliction of emotional distress. Defendants filed a verified Answer with Counterclaims on September 4, 2020, to which Plaintiffs filed a reply on September 10, 2020.

Plaintiffs filed a motion to extend the time for service of the Summons and Complaint and for permission to serve and file and a verified Amended and Supplemental Complaint, which was granted by the Court in an Order signed February 25, 2021. Plaintiffs filed an Amended Complaint on March 2, 2021 listing six causes of action.

Defendants filed this motion to dismiss on March 22, 2021, and Plaintiffs filed opposition papers to the motion. Plaintiffs then filed reply papers. The parties appeared for oral argument on the motion, which was conducted virtually.

LEGAL DISCUSSION AND ANALYSIS

In this case, Defendants have moved for dismissal under CPLR 3211 (a)(1) [documentary evidence] and CPLR 3211 (a)(7) [failure to state a cause of action]. To prevail under CPLR 3211 (a) (1), the movant must establish that "the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *MLB Constr. Servs., LLC v. Lake Ave. Plaza, LLC*, 156 AD3d 983, 985 (3rd Dept. 2017), *citing Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002); *Shephard v. Friedlander*, 195 AD3d 1191 (3rd Dept. 2021); *Crepin v. Fogarty*, 59 AD3d 837 (3rd Dept. 2009). Dismissal may be granted when the "factual claims ... are flatly contradicted by documentary evidence or are inherently incredible." *Hyman v. Schwartz*, 127 AD3d 1281, 1283 (3rd Dept. 2015) *quoting DerOhannesian v. City of Albany*, 110 AD3d 1288, 1289 (3rd Dept. 2013); *Ozdemir v. Caithness Corp.*, 285 AD2d 961, 963 (3rd Dept. 2001) ("a court need not accept as true legal conclusions or factual allegations that are either inherently incredible or flatly contradicted by documentary evidence."). "[I]t is clear that judicial records, as well as documents reflecting out-of-court

transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' would qualify as 'documentary evidence' in the proper case." *Fontanetta v. John Doe 1*, 73 AD3d 78, 84-85 (2nd Dept. 2010); *see Koziatek v. SJB Dev. Inc.*, 172 AD3d 1486 (3rd Dept. 2019). Affidavits do not constitute documentary evidence contemplated under this section. *State of NY Workers' Compensation Bd. v. Madden*, 119 AD3d 1022 (3rd Dept. 2014); *Crepin v. Fogarty*, 59 AD3d 837. "When documentary evidence is submitted by a defendant, 'the standard morphs from whether the plaintiff stated a cause of action to whether it has one.'" *Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 (1st Dept. 2014), *quoting* John R. Higgitt, CPLR 3211[a][7] and [a][7] Dismissal Motions-Pitfalls and Pointers, 83 NY St. BJ 32, 33 (2011). That is because the documentary evidence is being used to conclusively establish that no cause of action exists. *See, e.g. State Farm Fire & Cas. Co. v. Main Bros. Oil Co.*, 101 AD3d 1575 (3rd Dept. 2012).

Defendants assert that the landlord under the lease agreement was 50 East 96th Street LLC, Successor in Interest to the Rights of Payson Estates, Inc., and that the other named defendants cannot be liable under the lease. The contract, and signatories to the contract, would indeed be the type of documentary evidence contemplated under CPLR 3211 (a)(1). Defendants maintain that A. Ruth & Sons Real Estate, Josh Ruth, Lee Ruth and Phillip Ruth were acting as agents of the landlord, and therefore cannot incur personal liability.

"When an agent acts on behalf of a disclosed principal, the agent will not be personally liable for a breach of contract unless there is clear and explicit evidence of the agent's intention to be personally bound." *Lido Beach Towers v. Denis A. Miller Ins. Agency, Inc.*, 128 AD3d 1025, 1027 (2nd Dept. 2015), *quoting Weinreb v. Stinchfield*, 19 AD3d 482, 483 (2nd Dept. 2005); *Simmons v. Washing Equip. Tech.*, 51 AD3d 1390, 1392 (4th Dept. 2008). Defendants have met their initial burden on the motion by: 1) highlighting that Plaintiffs' Amended Complaint ¶ 5 states that "Defendants Josh Ruth, Lee Ruth and Phillip F. Ruth ... are owners and/or members of Defendant ... and/or acted as agents, servants and/or employees of the [Landlord] and/or A. Ruth and Sons Real Estate"; 2) referencing various emails attached to Plaintiffs' Amended Complaint wherein the named individuals are noted as A. Ruth and Sons representatives and utilize an email address from "aruthandsons.com", and communicate regarding past due rents and payment options; and 3) showing communications that make clear that the named individuals and A. Ruth and Sons were acting on behalf of the landlord and do not show any

intent to be personally liable. *See, e.g. Weinreb v. Stinchfield*, 19 AD3d 482; *American Diabetes Assn. v. Abbey, Mecca & Co, Inc.*, 77 AD3d 1333 (4th Dept. 2010). Plaintiffs claim that there has been no discovery yet in this matter, and that the relationship, if any, between 50 East 96th Street, LLC, Payson Estates, A. Ruth & Sons Real Estate, and the individual defendants needs to be further explored through disclosure.

In this case, the Defendants did Answer the first Complaint, but after Plaintiffs' succeeded in obtaining an Order to permit late service and the filing of an Amended Complaint, the Defendants have now filed a motion to dismiss. Since the Amended Complaint replaces the initial Complaint, Defendants have properly filed a motion to dismiss, prior to serving an Answer to the Amended Complaint. Therefore, normal rules pertaining to motions to dismiss apply, and presume that there has been no discovery conducted.

This is essentially a landlord-tenant dispute. On this motion, Defendants have submitted copies of the lease agreement signed in September 2016, and renewals/extensions of the lease for additional one year terms in October 2017, October 2018 and October 2019. The lease contracts are proper documentary evidence to consider on a motion to dismiss under CPLR 3211(a)(1). The lease and renewals/extensions all list 50 East 96th Street LLC, successor in interest to the rights of Payson Estates, Inc., as the Landlord. The parties also entered into a storage space license agreement, that specifies the person signing on behalf of 50 East 96th Street LLC is a member of the LLC, or managing agent. "[O]ne who executes a contract on behalf of a corporation without also signing it in his individual capacity is not personally obligated under the agreement." *Kreutter v. McFadden Oil Corp.*, 71 NY2d 460, 468 (1988), *citing Rene Boas & Associates v. Vernier*, 22 AD2d 561, 563 (1965); *see Shephard v. Friedlander*, 195 AD3d 1191. In the present case, the leases and license agreements were not signed by any of the individual defendants in their own personal capacity, and there is absolutely no indication that any of the named individual defendants or A. Ruth and Sons exhibited any intention to be personally bound. The lease identifies the LLC as the property owner and landlord, and the signatures are executed on behalf of the landlord, "for the officer is in effect an agent of the corporate principal." *Shephard v. Friedlander*, 195 AD3d at 1193. The license agreements refer to the signing individual as a member or managing agent, and provide further proof of the signer's status as an agent of the landlord, or as agents of a disclosed principal. *Cf. Shepard v. Friedlander*, 195 AD3d 1191 (contract was ambiguous as to whether signer was signing in his

personal capacity or as agent). Further, and even more importantly, there are no allegations in the Plaintiffs' Amended Complaint that any of the named individuals signed in a personal capacity, or that the individual defendants or A. Ruth and Sons intended to be personally liable to Plaintiffs, other than conclusory statements that those individuals are personally liable. *See, Simmons v. Washing Equip. Tech.*, 51 AD3d 1390. There are no specific actions alleged to support a claim that the individuals were acting in any capacity other than an agent for the named, and disclosed, landlord. Thus, the Defendants' submissions (of documentary evidence) refute any allegations in the Plaintiffs' Amended Complaint that would suggest liability on the part of the individuals named defendants in their individual capacities, or of A. Ruth and Sons. Accordingly, the individual defendants and A. Ruth and Sons are entitled to dismissal under CPLR 3211 (a)(1).

CPLR 3211 (a) (7) concerns motions to dismiss for the failure to state a cause of action. "The grounds for dismissal under CPLR 3211 (a) (7) are ... strictly limited; the court is not allowed to render a determination upon a thorough review of the relevant facts adduced by both parties, but rather is substantially more constrained in its review, examining only the plaintiff's pleadings and affidavits." *Carr v. Wegmans Food Mkts., Inc.*, 182 AD3d 667, 668 (3rd Dept. 2020) *citing Rovello v. Orofino Realty Co.*, 40 NY2d 633, 635 (1976); *Sokol v. Leader*, 74 AD3d 1180, 1181 (2nd Dept. 2010). "Notwithstanding the broad pleading standard, bare legal conclusions with no factual specificity do not suffice to withstand a motion to dismiss ...[and] '[d]ismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery.'" *Mid-Hudson Valley Fed. Credit Union v. Quartararo & Lois, PLLC* 155 AD3d 1218, 1219 (3rd Dept. 2017) [internal citations omitted] *quoting Connaughton v. Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 (2017).

While the court is normally constrained to the facts as pleaded in the complaint, on a 3211 (a) (7) motion, "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Leon v Martinez*, 84 NY2d 83,88 (1994) [internal quotation marks and citations omitted]. Under this section, the court "must afford the complaint a liberal construction, accept the facts as alleged in the pleading as true, confer on the plaintiff(s) the benefit of every possible inference and determine whether the facts as alleged fit

within any cognizable legal theory." *Torok v. Moore's Flatwork & Founds., LLC*, 106 AD3d 1421, 1421 (3rd Dept. 2013) [internal quotation marks and citation omitted]; *NYAHSA Servs., Inc., Self-Ins. Trust v. People Care Inc.*, 141 AD3d 785, 788 (3rd Dept. 2016); *Lewis v. DiMaggio*, 115 AD3d 1042 (3rd Dept. 2014); *Lopes v. Bain,* 82 AD3d 1553 (3rd Dept. 2011); *see Tenney v. Hodgson Russ, LLP*, 97 AD3d 1089, 1090 (3rd Dept. 2012); *Leon v. Martinez,* 84 NY2d 83. "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005); *see also AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 NY3d 582 (2005); *Jacobs v. Macy's East, Inc.*, 262 AD2d 607 (2nd Dept. 1999). The Court of Appeals has stated:

> Initially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail (*see Foley v D'Agostino*, 21 AD2d 60, 64-65; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3211:24, p 31; 4 Weinstein-Korn-Miller, NY Civ Prac, par 3211.36). When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate (*see Rappaport v International Playtex Corp.*, 43 AD2d 393, 394-395; 4 Weinstein-Korn-Miller, NY Civ Prac, par 3211.36; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3211:25, p 31).

Guggenheimer v. Ginzburg, 43 NY2d 268, 275 (1977).

Plaintiffs' Amended Complaint contains six causes of action: 1) breach of warranty of habitability and quiet enjoyment; 2) harassment; 3) recoupment of rents; 4) breach of lease and duty to repair and keep the apartment safe and habitable; 5) "fear of danger", and 6) intentional infliction of emotional distress. The Court will address these claims individually.

1. Breach of warranty of habitability and quiet enjoyment

"A residential lease is ... deemed a sale of shelter and services by the landlord who impliedly warrants: first, that the premises are fit for human habitation; second, that the condition of the premises is in accord with the uses reasonably intended by the parties; and, third, that the tenants are not subjected to any conditions endangering or detrimental to their life, health or safety." *Park West Management Corp. v. Mitchell*, 47 NY2d 316, 325 (1979), *cert denied* 444 US 992 (1979); *Solow v. Wellner*, 86 NY2d 582 (1995); *Newkirk v. Scala*, 90 AD3d 1257, 1257 (3rd Dept. 2011) ("Every residential lease contains an implied warranty of habitability"). Real Property Law § 235-b is the statutory embodiment of a warranty of habitability and applies in residential leases. *See, Birch v. Ryan*, 281 AD2d 786 (3rd Dept. 2001). That section gives "rise to an implied promise on the part of the landlord that ... the demised premises ... are fit for human occupation at the inception of the tenancy and that they will remain so throughout the lease term." *Vanderhoff v. Casler*, 91 AD2d 49, 50 (3rd Dept. 1983), *citing Park West Management Corp. v. Mitchell*, 47 NY2d at 327.

Defendants take issue with the fact Real Property Law § 235-b was not referenced until Plaintiffs filed their opposition papers to this motion. Certainly, a plaintiff's complaint must "be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and the material elements of each cause of action or defense" (CPLR § 3013), but insofar as Plaintiffs here have denoted the first cause of action to include breach of habitability, the failure to specifically identify the statute is of no moment. It is two different ways to say the same thing. An implied warranty of habitability is the thrust of Real Property Law § 235-b. That statute creates the implied promise on the part of the landlord that the premises are habitable [*See, Park West Management Corp. v. Mitchell*, 47 NY2d 316], or, in other words, warrants habitability. The Court is not convinced there is even any difference between a claim for breach of warranty and a violation of the statute, but if there is, then Plaintiffs' cause of action in general is for breach of habitability, and more specifically is a violation of the statute. Alleging a violation of the statute can be a method by which Plaintiffs satisfy their burden to show breach of warranty of habitability. The Court discerns no surprise or prejudice to Defendants as the result of Plaintiffs' inclusion of the statute

in their opposition papers, or the failure to initially identify the statute in their Amended Complaint. Plaintiffs' Complaint and Amended Complaint have always asserted that the premises were not fit for human habitation.

A breach of the warranty of habitability occurs "[i]f, in the eyes of a reasonable person, defects in the dwelling deprive the tenant of those essential functions which a residence is expected to provide." *Id.* at 328; *Solow v. Wellner*, 86 NY2d at 589. "In order to prove a claim for breach of the warranty of habitability, plaintiffs must show the extensiveness of the breach, the manner in which it affected the health, welfare or safety of the tenants, and the measures taken by the landlord to alleviate the violation." *Diamond v. New York City Hous. Auth.*, 179 AD3d 525 (1st Dept. 2020) (citation omitted). The warranty of habitability relates to matters that affect the health and safety of the tenants, as well as items essential to being able to utilize the leased premises, like an elevator in a high-rise building. *Solow v. Wellner*, 86 NY2d at 588-589. Examples of health and safety concerns include "insect or rodent infestation, insufficient heat and plumbing facilities, significantly dangerous electrical outlets or wiring, inadequate sanitation facilities or similar services which constitute the essence of the modern dwelling unit." *Park West Mgmt. Corp. v. Mitchell*, 47 NY2d at 328. The lack of an elevator in a high rise building would make upper floors virtually unusable, and would prevent the tenants from using the premises in a manner reasonably intended by the parties (the second warranty of a residential lease as identified in *Park West Management v. Mitchell*).

Plaintiffs' Amended Complaint contains 112 numbered paragraphs, and includes allegations as to defects and/or hazards in the apartment including: "many openings and gaping holes in the walls and ceilings, causing rodent infestation for years" (Amended Complaint ¶¶12, 60); locks on the front door were broken and not repaired making the tenant feel very insecure (¶58, 69); water damage and grey mold in the bathroom (¶59); mice coming in from scaffolding that blocked the windows of the apartment and condoms outside the window (¶61); tenant's concern about mice infestation due to mice carrying diseases (¶64); plaster falling down on clothes and her children (¶64); cracked and missing paint causing tenant to fear that underlying paint was lead-based (¶98). These types of complaints and defects go the health, welfare and safety of the tenants. The Court finds that Plaintiffs have adequately pleaded a claim against the landlord for breach of warranty of habitability. *See, e.g., Sheffield v. Pucci*, 2019 NYMisc LEXIS 1736 (Sup. Ct., New York County 2019).

With respect to a claim for breach of the covenant of quiet enjoyment, a plaintiff must allege actual or constructive eviction. *Jackson v. Westminster House Owners Inc.*, 24 AD3d 249 (1st Dept. 2005) "[U]nless there is an eviction, actual or constructive, there is no breach of the covenant of quiet enjoyment." *Dave Herstein Co. v. Columbia Pictures Corp.*, 4 NY2d 117, 121 (1958). "For there 'to be an eviction, constructive or actual, there must be a wrongful act by the landlord which deprives the tenant of the beneficial enjoyment or actual possession of the demised premises'" *Sheffield v. Pucci*, 2019 NYMisc LEXIS 1736, *24, *quoting Barash v. Pennsylvania Terminal Real Estate Corp.*, 26 NY2d 77, 82 (1970); *see, Jackson v. Westminster House Owners Inc.*, 24 AD3d 249; *142 Fifth Ave. Owners Corp. v. Ferrante*, 2019 NY Misc LEXIS 5612 (Sup. Ct., New York County 2019). Actual eviction is when the landlord removes the tenant from physical possession of the premises, while constructive eviction involves a "landlord's wrongful acts [which] substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises." *Barash v. Pennsylvania Terminal Real Estate Corp.*, 26 NY2d at 83. If the eviction is constructive, the tenant must show an abandonment of the premises. *Id.* at 83; *Dave Herstein Co. v. Columbia Pictures Corp.*, 4 NY2d 117; *Genovese Drug Stores, Inc. v. William Floyd Plaza, LLC*, 63 AD3d 1102 (2nd Dept. 2009); *Jackson v. Westminster House Owners Inc.*, 24 AD3d 249, *see, Dance Magic, Inc. v. Pike Realty, Inc.*, 85 AD3d 1083 (2nd Dept. 2011). "[W]here the tenant remains in possession of the demised premises there can be no constructive eviction." *Barash v. Pennsylvania Terminal Real Estate Corp.*, 26 NY2d at 83. Here, Plaintiffs' Amended Complaint does not allege that the tenant abandoned the premises, but rather, that the landlord declined to renew the lease when it expired. *See, Sheffield v. Pucci*, 2019 NYMisc LEXIS 1736. In fact, this action was commenced before the lease ended. Even though Plaintiffs argue in their opposition papers that there was a constructive eviction, the Amended Complaint does not contain that allegation. Since the Amended Complaint does not allege that the Tenant abandoned the premises, there can be no claim for constructive eviction, and the claim for breach of quiet enjoyment must be dismissed. *Genovese Drug Stores, Inc. v. William Floyd Plaza, LLC*, 63 AD3d 1102; *Duane Reade v. Reva Holding Corp.*, 30 AD3d 229 (1st Dept. 2006); *see, Barash v. Pennsylvania Terminal Real Estate Corp.*, 26 NY2d 77.

2. Declaratory judgment that landlord's demands for payment were illegal and relieve tenant of responsibility to pay rent

Defendants move for dismissal of the second cause of action by arguing that there is no civil cause of action in New York for harassment. In opposition, Plaintiffs claim that they are not actually pursuing a claim of "harassment", but rather, the alleged "harassing" actions of the Defendants/Landlord entitle Plaintiffs to a declaratory judgment that no rent is owed, and prior rent paid should be returned to Plaintiffs.

Harassment is not a recognized cause of action in New York. *Carroll v. Rondout Yacht Basin, Inc.*, 162 AD3d 1150 (3rd Dept. 2018); *Wells v. Town of Lenox*, 110 AD3d 1192 (3rd Dept. 2013); *Hartman v. 536/540 E. 5th Street Equities*, 19 AD3d 240 (1st Dept. 2005). Although there is some confusion as to the actual claim being asserted in the second cause of action (which gives some credence to Defendants' argument that it cannot be forced to defend or Answer a claim that is not sufficiently clear), it does appear, to the satisfaction of the Court, that Plaintiffs seek declaratory judgment, and plan to use the alleged harassing actions and improper demands for payment of rent as their proof. Primarily, Plaintiffs assert that the demands for payment of rents were: 1) in contravention of Executive Orders issued in response to the COVID-19 pandemic, and 2) utilized illegal and unauthorized forms in violation of applicable Executive Orders, causing tenant to fear for the safety of her family, for the landlord's own gain in collecting unpaid rents.

However, even if the Court views the second cause of action as seeking declaratory judgment, and even if the Court finds that Plaintiffs have sufficiently alleged that Defendants actions were "harassing", that does not mean that Plaintiffs are entitled to a determination that no rents are due. Plaintiffs have failed to set forth the legal basis upon which such a conclusion can be made. Real Property § 235-d provides for an injunction or other order that the Court finds just, but violation of that statute does not necessarily mean that a Landlord forfeits all rents. It is important to recall that Tenant completed her initial lease term and multiple extensions. She did enjoy the benefit of the premises and did not vacate the premises until the Landlord declined to renew her lease. Even if the Landlord is guilty of the harassing acts, the Court cannot grant an Order that Tenant should not have to pay rent. *See, Barash v. Pennsylvania Terminal Real Estate Corp.*, 26 NY2d at 83 (it is "inequitable for the tenant to claim substantial interference

with the beneficial enjoyment of his property and remain in possession without payment of rent."(citations omitted)). Rather, the Tenant may be able to show a breach of the warranty of habitability and be entitled to an award of damages, but not a complete abatement of rent. *See, Park West Mgmt. Corp. v. Mitchell*, 47 NY2d 316. Further, Plaintiffs do not point to any part of the Executive Orders (proscribing various actions relative to eviction proceedings), that would entitle them to a finding that no payments of rent are appropriate when the tenant remained in possession of the premises throughout the term of the lease. Thus, even giving the Plaintiffs every favorable inference and accepting all their allegations of harassment as true, as the Court must do on this motion to dismiss, Plaintiffs have not shown a legal entitlement to the relief requested- that no rent is owed and tenant should recover prior rent paid. Accordingly, this cause of action is dismissed.

3. Recoupment of all rents paid, or in the alternative, a finding of the appropriate amount that should have been paid

As noted in the preceding section, Plaintiffs have not set forth a basis for recoupment of all rents paid, particularly since the tenant remained in possession of the leased premises until the end of the lease terms. Rather, if Plaintiffs are successful in their claim for breach of habitability, they may be entitled to an award of damages. "[T]he proper measure of damages for breach of the warranty is the difference between the fair market value of the premises if they had been as warranted, as measured by the rent reserved under the lease, and the value of the premises during the period of the breach. The award may take the form of a sum of money awarded the tenant in a plenary action or a percentage reduction of the contracted-for rent as a setoff in summary nonpayment proceeding in which the tenant counterclaims or pleads as a defense breach by the landlord of his duty to maintain the premises in habitable condition." *Park West Mgmt. Corp. v. Mitchell*, 47 NY2d at 329. Thus, there can be consideration given to the amount of rent that should have been paid, as Plaintiffs request, but that is evaluated in the context of damages awardable based on the breach of the warranty of habitability. That is precisely what the first cause of action addresses. The third cause of action is duplicitous, and is therefore, dismissed.

4. Breach of contract and landlord's duty to repair and keep the apartment safe and habitable

Defendants seek dismissal of this cause of action on the basis that it is also duplicative of the breach of the warranty of habitability claim. As noted above, there is an implied warranty of habitability in all lease agreements, as embodied in Real Property Law § 235. However, that does not preclude the parties from contractually agreeing to additional terms that may be related to, but independent, of the warranty of habitability. For example, Plaintiffs have alleged that the Landlord agreed to make certain repairs such as replacing the locks on the door and re-painting the bathroom. Those defects may, or may not, constitute a breach of the warranty of habitability. If they do not rise to that level, Plaintiffs may still be able to claim that the landlord nevertheless breached its agreement and promises. The scaffolding might also not constitute a breach of the warranty of habitability, but could form the basis of a breach of contract claim that the safety of the tenant and her children was inadequately protected, or if the landlord agreed to remove the scaffolding and failed to do so. Based upon these factors, the Court concludes that the Fourth Cause of action is not duplicative of the first cause of action; and that Plaintiff has sufficiently pleaded a cause of action sounding in breach of the lease agreement.

5. Claim for a fear of danger (negligent infliction of emotional distress) and intentional infliction of emotional distress

Plaintiffs' fifth cause of action claims that Defendants have caused the tenant damage due to the fear of danger to herself and two children. Defendants seek dismissal on the grounds that there is no "fear of danger" cause of action in New York.

Plaintiffs' sixth cause of action is for intentional infliction of emotional distress. Defendants seek dismissal of that claim as falling short of the extreme conduct necessary to support a claim for intentional infliction of emotional distress, and that Plaintiff tenant did not observe a serious injury or death of an immediately family member.

Plaintiffs have not identified the basis of a claim for "fear of danger", nor cited to any authority for the same. In fact, in their opposition papers, Plaintiffs ask the Court to look to the Complaint to see what cognizable cause of action is available given the allegations, and not whether the Plaintiff have correctly or artfully stated one. Plaintiffs also seem to concede that,

although inartfully articulated, the fifth and sixth causes of action really are for negligent infliction of emotional distress and intentional infliction of emotional distress. Plaintiffs contend that the tenant was owed a duty by the landlord by virtue of the implied warranty of habitability under Real Property Law § 235-b, and that she endured emotional harm resulting from the unsafe and unhealthy conditions of her apartment, as well as from the landlord's efforts to collect on the rent.

For ease of discussion, the Court will address the claim for intentional infliction of emotional distress first, and then consider the claim for negligent infliction of emotional distress. Intentional infliction of emotional distress "has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." *Howell v. New York Post Co.*, 81 NY2d 115, 121 (1993); *Chanko v. American Broadcasting Cos., Inc.*, 27 NY3d 46 (2016); *Mitchell v. Giambruno*, 35 AD3d 1040 (3rd Dept. 2006); *See, Loch Sheldrake Beach & Tennis Inc. v. Akulich*, 141 AD3d 809, 814 (3rd Dept. 2016), *quoting Hyman v. Schwartz*, 127 AD3d at 1283; *Howell v. New York Post Co.*, 81 NY2d 115; *see also, Rizk v. City of New York*, 462 F.Supp.3d 203 (EDNY 2020). The standard is "rigorous, and difficult to satisfy (Prosser and Keeton, Torts § 12, at 60-61 [5th ed])... 'Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Howell v. New York Post Co.*, 81 NY2d at 122, *quoting Murphy v. American Home Prods. Corp.*, 58 NY2d 293, 303 (1983); *Hyman v. Schwartz*, 127 AD3d at 1284; *Lawrence v. North Country Animal Control Ctr., Inc.*, 126 AD3d 1078, 1080 (3rd Dept. 2015). Caselaw shows that the vast majority of cases alleging intentional infliction of emotional distress fail on the outrageous and extreme element. *Howell v. New York Post Co.*, 81 NY2d at 122. Federal courts interpreting New York law have concluded that the claims must involve "some combination of public humiliation, false accusations of criminal or heinous conduct, verbal abuse or harassment, permanent loss of employment, or conduct contrary to public policy." *Mestecky v. New York City Dept. of Educ.*, 2018 USDist LEXIS 235035 (EDNY 2018) (quotation omitted). Here, Plaintiffs' claim consists of a claim for breach of the lease/breach of habitability, as well as harassing actions relative to the attempts to collect rents. As already discussed, Plaintiffs contend that the Landlord failed to undertake repairs to

make the apartment "habitable" such as replacing locks, sealing holes in the wall to prevent rodent infestation, failure to remove scaffolding from outside the Tenant's window also compromising their safety and allowing other trash and debris to remain. There are no specifics in the Amended Complaint regarding actual infestation or anyone breaking in. The complaints, although unpleasant, do not rise to the level required in a claim for intentional infliction of emotional distress. *See, e.g. Loch Sheldrake*, 141 AD3d 809; *Lawrence v. North Country Animal Control Ctr., Inc.*, 126 AD3d 1078. With respect to the claims concerning rent collection, there is no allegation that the Landlord commenced eviction proceedings against the Tenant, so the Landlord did not violate the Executive Orders providing for a moratorium on evictions. Nor does Landlord's attempt to collect on the debt rise to the level of extreme or outrageous behavior.

Even assuming all the allegations in Plaintiffs' Amended Complaint to be true, they do not rise to the level of outrageous and extreme conduct. Therefore, Plaintiffs' claim for intentional infliction of emotional distress is dismissed.

The Court now turns to the claims for negligent infliction of emotional distress. The Court of Appeals has recognized three lines of cases regarding emotional injuries. "The first recognizes that when there is a duty owed by defendant to plaintiff, breach of that duty resulting directly in emotional harm is compensable even though no physical injury occurred." *Kennedy v. McKesson Co.*, 58 NY2d 500, 504 (1983). The second involves the "zone of danger rule, which allows one who is himself or herself threatened with bodily harm in consequence of the defendant's negligence to recover for emotional distress resulting from viewing the death or serious physical injury of a member of his or her immediate family." *Bovsun v. Sanperi*, 61 NY2d 219, 228 (1984); *see, Greene v. Esplanade Venture Partnership*, 36 NY3d 513 (2021) (detailed discussion of the evolution of claims for emotional distress for a bystander who did not suffer physical injury and was not owed a direct duty; and concluding that immediate family member can include a grandparent). "The third branch of the emotional injury decisions involves the violation of a duty to plaintiff which results in physical injury to a third person but only financial or emotional harm or both to the plaintiff." *Kennedy v. McKesson Co.*, 58 NY2d at 505.

The "bystander" or "zone of danger" theory would not apply here, because Plaintiffs have not alleged death or serious injury of anyone, so Plaintiffs cannot have viewed such an event.

The third branch of emotional injury is also inapplicable, again because Plaintiffs have not alleged any physical injury to any third person. The focus here is the first line of cases- an alleged breach of a duty owed by defendant to plaintiff, resulting in emotional harm. Here the breach of duty would be related to the breach of the warranty of habitability.

There is a conflict in caselaw as to whether extreme and outrageous conduct is an element of a claim for negligent infliction of emotional distress. *See, Rizk v. City of New York*, 462 F.Supp.3d 203. In *Taggart v. Costabile*, 131 AD3d 243, 245 (2nd Dept. 2015), the Second Department held that "notwithstanding case law to the contrary, extreme and outrageous conduct is not an essential element of a cause of action to recover damages for negligent infliction of emotional distress" (emphasis added). However, the First Department has held that extreme and outrageous conduct is an essential element, even subsequent to the *Taggart* decision. *See, Norris v. Innovative Health Sys., Inc.*, 184 AD3d 471 (1st Dept. 2020); *Xenias v. Roosevelt Hosp.*, 180 AD3d 588 (1st Dept. 2020); *Holmes v. City of New York*, 178 AD3d 496 (1st Dept. 2019); *Kerzhner v. G4S Govt. Solutions, Inc.*, 138 AD3d 564 (1st Dept. 2016); *Kornicki v. Shur*, 132 AD3d 403 (1st Dept. 2015). Prior to *Taggart*, the Fourth Department adhered to the rule that extreme and outrageous conduct was required. *See, Deak v. Bach Farms, LLC*, 34 AD3d 1212 (4th Dept. 2006); *Peters v. Rome City School Dist.*, 298 AD2d 864 (4th Dept. 2002). However, more recently, the Fourth Department cited the *Taggart* decision approvingly, and stated that such extreme and outrageous conduct was not required. *Stephanie L. v. House of The Good Shepherd*, 186 AD3d 1009 (4th Dept. 2020). The *Stephanie L.* court case did not specifically address whether it was overruling its prior precedent. The Third Department has not weighed in, to date, as to the applicability of *Taggart.* However, the Third Department's prior decisions make clear that the Third Department has required extreme and outrageous conduct to be shown. *See, Wells v. Town of Lenox*, 110 AD3d 1192, 1193 (causes of action for intentional and negligent infliction of emotional distress properly dismissed because plaintiffs failed "to attribute to defendants … conduct that is so extreme and outrageous as to be considered atrocious and utterly intolerable" [citation omitted]); *Moore v. Melesky*, 14 AD3d 757, 761 (3rd Dept. 2005) ("the complaint fails to state a cause of action for either intentional or negligent infliction of emotional distress because it attributes to defendants neither conduct that is so extreme and outrageous as to be considered "atrocious and utterly intolerable." [end quotations omitted]). This Court must follow the Third Department, which has spoken directly on the issue,

notwithstanding conflicting cases from other Departments. As already discussed above, the allegations in Plaintiffs' Amended Complaint are not so extreme and outrageous to meet the high threshold for intentional or negligent infliction of emotional distress. Therefore, the claim for negligent infliction of emotional distress cannot be sustained.

Even if the Court were to follow the *Taggart* line of cases, and not require extreme and outrageous conduct on the part of the Defendants, Plaintiffs would have to show "a breach of a duty owed to her which unreasonably endangered her physical safety, or caused her to fear for her own safety." *Graber v. Bachman*, 27 AD3d 986, 987 (3rd Dept. 2006) (citations omitted); *E.M. v. 2345 83rd St, LLC*, 2021 NYMisc LEXIS 2416 (Sup. Ct. Kings County 2021); *see, Johnson v. New York City Bd. of Educ.*, 270 AD2d 310 (2nd Dept. 2000). Under a claim for infliction of emotional distress (intentional or negligent), the conduct must be "'especially calculated to cause, and does cause, mental distress of a very serious kind.'" *Kusmierz v. Baan*, 144 AD2d 829, 831-832 (3rd Dept. 1988), *quoting Green v. Leibowitz*, 118 AD2d 756, 757 (2nd Dept. 1986). Plaintiffs contend that Defendants failed to maintain the apartment in a reasonably safe condition, thereby endangering the welfare of the Tenant and her children, and causing them to fear for their safety. However, Plaintiffs allegations are conclusory, belied by the facts and too remote and speculative. *See, e.g. Johnson v. New York City Bd. of Educ.*, 270 AD2d 310; *Courtney v. Bd. of Mgrs. of the Chadwin House Condominium*, 2021 NYMisc. LEXIS 2545 (Sup. Ct. New York County 2021). Although the Tenant reported defects to the Landlord, she nonetheless continued to renew the lease multiple times. There were no specific instances of actual rodent infestation alleged, nor any attempts by someone to break into the apartment. It was only after the lease was not renewed and this litigation ensued that Plaintiffs alleged that her personal safety was endangered of that she feared for her own safety and/or the safety of her children. Plaintiffs also fail to identify any serious mental distress she allegedly sustained, such as a diagnosis of a psychiatric condition or any medical care. The Court is not suggesting that medical treatment and medical evidence is necessary to resist a motion to dismiss, but the Amended Complaint fails to identify any symptoms, conditions, treatments or prescriptions that could support a finding that the mental distress was of a very serious kind. Accordingly, Plaintiffs' allegations are conclusory and fail to state any cognizable cause of action. *Johnson v. New York City Bd. of Educ.*, 270 AD2d 310. Therefore, the claim for negligent infliction of emotional distress is dismissed.

Defendant also claims that Plaintiff McDonough lacks standing, as he was simply a guarantor under the lease, but not the tenant or principal of the lease. Plaintiffs argue that the guarantor has independent standing based on the money he paid for rent on the premises, and that he can argue that there was not proper consideration for the guarantee.

"A guaranty 'is a contract secondary liability ... [and] a guarantor will be required to make payment only when the primary obligor has first defaulted.'" *PAF-PAR LLC v. Silberberg*, 118 AD3d 446, 446 (1st Dept. 2014), *aff'd* 27 NY3d 930 (2014), *quoting Weissman v. Sinorm Deli*, 88 NY 437, 446 (1996). If the contracting party fails to make payments on the contractual obligation, the guarantor may also be sued to collect on the obligation which he or she guaranteed. In such a situation, the guarantor may assert defenses to the guarantee, such as lack of consideration. The guarantor, however, does not have standing to sue on the contract. *See, W. & M. Operating, L.L.C v. Bakhshi*, 2018 NYMisc LEXIS 1081 (Sup. Ct. New York County 2018), *citing Yung Hua Tsang v. Berley*, 2014 NYMisc. LEXIS 2969 (Sup Ct, New York County 2014) (Rakower, J.) (guarantor "does not have independent standing to raise claims under the Lease."). Here, the Amended Complaint does not assert a claim for lack of consideration for the guarantee, and it is only brought up in opposition to Defendants' motion to dismiss. In any event, the guarantor lacks standing to bring an action under the lease. Accordingly, the claims brought by Plaintiff McDonough must be dismissed.

CONCLUSION

Based on the foregoing discussion, it is hereby

ORDERED, that Defendants' motion to dismiss the Amended Complaint against A. Ruth & Sons Real Estate, Josh Ruth, Lee Ruth and Phillip F. Ruth is GRANTED; and it is further

ORDERED, that Defendants' motion to dismiss the claim for breach of warranty of habitability is DENIED, and the motion to dismiss the claim for breach of quiet enjoyment is GRANTED; and it is further

ORDERED, that Defendants' motion to dismiss the second cause of action is GRANTED; and it is further

ORDERED, that Defendants' motion to dismiss the third cause of action for recoupment of rents paid is GRANTED; and it is further

ORDERED, that Defendant's motion to dismiss the fourth cause of action for breach of contract is DENIED; and it is further

ORDERED, that Defendants' motion to dismiss the fifth and sixth causes of action claiming intentional and negligent infliction of emotional distress is GRANTED; and it is further

ORDERED, that Defendant's motion to dismiss all causes of action asserted by Plaintiff McDonough is GRANTED; and it is further

ORDERED, that the parties are hereby directed to appear for a preliminary conference to be held by virtually by Microsoft Teams on OCTOBER 28, 2021 AT 2:00 PM.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

ENTER:

Dated: September 24, 2021
Binghamton, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice