Thuku v 324 E. 93 LLC
2022 NY Slip Op 31267(U)
April 12, 2022
Supreme Court, New York County
Docket Number: Index No. 452203/2018
Judge: Francis A. Kahn III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS KAHN, III** **PART** **32**

Justice

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TIMOTHY THUKU, as the Administrator of the Estate Of LEMMY THUKU,

Plaintiff,

- v –

324 E. 93 LLC,PERRY GAULT MANAGEMENT CO. INC.,DAVID SHEPHERD, ASHLEY SHEPHERD,

Defendant.

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INDEX NO. 452203/2018

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, the motion and cross-motion are determined as follows:

This action arises out of a five-alarm fire that occurred on October 27, 2016, at a five-story walk-up apartment located at 324 East 93rd Street, New York, New York. Plaintiff, Timothy Thuku ("Thuku"), is the fiduciary of the estate of Lemmy Thuku ("Decedent"), a co-lessee of an apartment at the location. Defendant 324 E. 93 LLC ("324 E 93") was the owner of the premises and Defendant Perry Gault Management Co., Inc. ("Gault") was the managing agent thereof. Defendants David Shepherd and Ashley Shephard ("Shephards") were also lessees of an apartment in the building and the fire originated in their premises, apartment 1W. It is undisputed that Decedent, a tenant of apartment 4W, perished in the fire and that his body was found at the foot of the third-floor landing. The Office of the New York City Medical Examiner determined the cause of death was smoke inhalation.

The fire was investigated by the New York City Fire Department and Fire Marshal Kenneth Hettwer was assigned. A Fire Incident Report, dated February 1, 2017, was issued, and stated the following under the heading Origin and Extension:

> Examination showed that fire originated in the subject premises, on the first floor, in apartment 1-W, in the living room approximately one foot from the north wall and one foot from the west wall at floor level in a combustible material (electrical cord insulation). Fire extended to the contents of the living room. Fire further extended to the walls and ceiling. Fire further extended to the entire apartment. Fire further extended to the public hallway through the apartment door. Fire

further extended to the walls and ceiling of the first floor public hallway. Fire further extended to the staircase to the second floor. Fire further extended to the walls and ceiling of the second floor public hallway. Fire further extended to the second floor apartments. Fire further extended to the second, third, fourth and fifth floor apartments via the interior stairs and auto exposure from the shafts. Fire extended to the bottom of the west light shaft via drop down. Fire extended to the basement via window. Fire further extended to the light/air shaft on the exposure four side via windows to shaft. Fire further extended to the second, third, fourth and fifth floor via auto exposure. Fire further extended to the cock loft and roof structures.
Fire further extended to all floors of 326 and 322 East 93rd Street with extension to the shaft rooms of the structure.
Fire further extended to the person of Rocco Clauss (M,W, DOB 5/29/92)
Fire further extended to the person of Lemmy Thuku (M,B. DOB 4/29/87)
Fire further extended to the person of James Duffy (M,W. DOB 6/20/35)
Fire was confined and extinguished thereto.

On October 28, 2016, the New York City Department of Buildings ("NYCDOB") issued a violation for the building noting that it has suffered extensive damage and that 90% of the roof as well as portions of the third and fifth floors had collapsed. NYCDOB directed that demolition of the building commence the same day as the order. 324 E 93 contracted Casella Construction Corporation ("Casella Construction") to demolish the premises. Their contract provided that "the insurance proceeds is the sole and total compensation due to contractor for contractor's full performance of the contract." Casella Construction retained multiple subcontractors to perform the actual demolition and contracted with Howard I. Shapiro & Associates, PC as consulting engineers for the project. Demolition commenced on October 28, 2016, and continued 12-hours per day until completion. Investigators retained by 324 E 93's insurer were on scene throughout the demolition and took numerous photographs both inside and outside the structure.

Plaintiff commenced this action alleging two causes of action for negligence and wrongful death against all Defendants.[1] In the three bills of particulars, Plaintiff posited numerous specific theories to support the claims of negligence, including: absence of a properly functioning self-closing door to apartment 1W, failing to annually inspect the self-closing doors in the building, an absence of sufficient functioning smoke detectors in the building, failing to inspect and replace the electrical wiring in the building, failure to install a sprinkler system and fireproofing materials in the building as well as various statutory and code violations. Plaintiff also served a second supplemental bill of particulars seeking punitive damages. Defendants 324 E 93 and Gault answered collectively and pled nineteen (19) affirmative defenses as well as crossclaims against Shepherds for common-law indemnification, contribution, and contractual indemnification. Defendant Shepherds answered and raised ten (10) affirmative defenses.

Now, Defendants move for summary judgment dismissing Plaintiff's complaint on the issue of liability, dismissing the punitive damages claim and for an order limiting the jury's apportionment of fault against the Gault Defendants, if any, to 50% or less, thereby entitling the

[1] Plaintiff originally only commenced the action against 324 E 93 and Gault, but after these Defendants commenced a third-party action against Shepherds, Plaintiff amended the complaint to join them as defendants.

Gault Defendants to the protections of CPLR § 1601's limitations on joint and several liability. Plaintiff opposed the motion and cross-moved to strike the answer of Defendants 324 E 94 and Gault for spoliation by demolishing the building at issue, summary judgment on liability against Defendants 324 E 94 and Gault, extending Plaintiff's time to move for summary judgment, if necessary, and for an immediate inquest on damages. The Shepherd Defendants partially oppose Defendants 324 E 94 and Gault's motion.

I. DEPOSITIONS

Jeffrey Gault's Deposition Testimony

Jeffrey Gault ("Jeffrey") testified that he is the President of Defendant Gault and a Managing Member of Defendant 324 E 93. He averred 324 E 93 acquired the building in 2007 and that no inspection of the premises was performed by an engineer before taking title. The premises was a five-story building, without an elevator, which had two residential apartments on each floor, designated as either East or West. Jeffrey initially testified the building was constructed in the early 1920's, but later averred he did not know when it was built. Gault performed maintenance at the premises and retained a superintendent to accomplish those tasks. During 324 E 93's ownership, the superintendent never resided at the premises. As to the tenancies, Jeffrey testified that apartment 1E was leased by Carmen Pisani ("Pisani"), apartment 1W was leased by Defendant Shepherds, apartment 2W was leased by Justin Love ("Love") and that Decedent and Gregory Kraft ("Kraft") leased apartment 4W.

He averred that after acquisition of the property, certain apartments, including 2E, 2W, 3W, 4E and 4W were extensively renovated, but apartment 1W was not. Most of the apartments were renovated from 2007 to 2011 and included installation of a second bathrooms and new kitchens. Jeffrey did not know if permits from NYCDOB were not obtained to perform the work, but claimed the contractor, RM Contracting, was supposed to obtain same. He admitted that City personnel never inspected the completed work.

Jeffrey stated that all the apartments had at least one door which opened on to a common hallway and that the apartments on the second to fifth floors had an additional door. He claimed the secondary doors were inoperable because no keys to the locks were available and opened into bedrooms. Jeffrey averred that he was not aware whether the main doors on the apartments were self-closing or not, but he claimed that no complaints were ever made regarding the door to apartment 1W. Jeffrey testified that he never physically entered apartment 1W. He also denied ever contacting a vendor to perform work on any apartment door. Jeffrey claimed ignorance as to whether any tenants complained to him about apartment doors slamming when closing.

Jeffrey testified that there was at least one battery powered smoke detector in every apartment, but claimed ignorance as to how many in each, including apartment 1W, and who installed the units. Later in his deposition, Jeffrey averred that apartments 2E, 2W, 3E, 3W, 4E and 4W had three smoke detectors. Jeffrey was unaware whether the batteries in the smoke detectors were ever changed or tested to see if the units were operable. However, Jeffrey claimed that whenever there was "turnover" in one of the apartments he instructed the superintendent to test the smoke alarms. He also stated that annual notices regarding the smoke

detectors were sent to all tenants. Jeffrey stated that a single smoke detector was installed on each floor of the common hallway, but he was not aware whether these units were ever checked or whether there was an established test process for these units.

Jeffrey testified he thought the building dated from the 1920's and was certain the type of wiring installed was different from that utilized presently. Each apartment had its own electric meter, and the tenants were responsible for paying for electrical service. Electric service in the common areas was provided by 324 E 93. The circuit breakers for the apartments were all located in the basement and the tenants did not have access to same. Jeffrey remembered that 324 E 93 paid for electrical work to be performed in the building, generally, and that he only used two electricians at the time. Concerning the renovations performed by 324 E 93, Jeffrey did not know whether any additional electrical outlets were installed in the refurbished kitchens or new bathrooms, but he knew no new electrical lines were brought into the building to service the new kitchens. Jeffrey did not remember whether any electrical work was ever performed or paid for in apartment 1W. Jeffrey averred he visited apartment 4W before the fire when there was a vacancy and when it was renovated. He stated the apartment had a kitchen, two bedrooms, two bathrooms and that an exterior fire escape was accessible from apartment 4W. Jeffrey acknowledged that Kraft requested an electrical outlet be installed in the original bathroom of apartment 4W and that 324 E 93 agreed and hired an electrician to perform the work.

Regarding electrical repairs in the other apartments, Jeffrey was showed numerous bills from electricians retained by 324 E 93 for services performed before the fire. The apartments with problems noted were 1E, 2W, 3E, 3W, 4E and 5W. Complaints were made about bulbs blowing out fast, defective fixtures, switches, outlets, and breakers. The repairs conducted involved, replacing fixtures, outlets, switches, and replacing wires, including burnt ones. One tenant experienced their entire apartment "shorting" from appliance use. Jeffrey understood an apartment shorting out to mean a tenant was using too many modern appliances in an early constructed building. Jeffrey did not recall receiving any complaints about lights flickering.

David Shepherd's Deposition Testimony

David Shepherd ("David") testified that he and his wife, Ashley Shepherd ("Ashley"), were lessees of apartment 1W at 324 E93 Street from 1991 to the incident in 2016. He stated that the door which divided the apartment and hallway closed automatically and he could not recall an instance when it did not close when released. Not long after they moved in, David averred that he approached the landlord at that time about performing renovations to the kitchen which included electrical upgrades and installation of a washer/dryer and dishwasher. David stated that he also wanted to upgrade the wiring in the apartment because when the refrigerator came on the lights would dim briefly.

David described that the work began with the installation of a conduit pipe in the basement and a circuit breaker panel in the kitchen. He averred that at the time he worked for an electrical contractor at theatres on Broadway and that he assisted an electrician selected by the landlord with the work. David said there was a two-pole 40-amp breaker which came off the electric meter and that from the load side thereof a wire was run to the new kitchen breaker box. That connection was made by running conduit pipe in the basement from the rear of the building

to the front through which wire was fed. Within that kitchen breaker box was a two-pole 40-amp breaker and individual breakers for the washer, dishwasher a well as the refrigerator and living room outlet. Also powered by the electrical upgrade was a microwave oven. He stated that BX-type electrical cable was run through the drop ceiling for electrical outlets for the refrigerator and living room. In total, five outlets were installed, four in the kitchen and one in the living room, each with a separate breaker in the kitchen box. David stated that no permit was obtained for the electrical work, but the work was inspected and performed by a licensed master electrician. David also performed other work in the apartment over the years including, plumbing, tiling, installing shelves and building a loft bed for his son. David averred the only wire molding he installed in the apartment was in his son's room to create a light switch.

David averred that a wire molding affixed to the living room wall that ran to an external two-plug outlet located either behind a dresser or under a window in the living room was there when they moved into the apartment in 1991. He offered confused testimony regarding the location of outlets, power strips, extension cords, where each ran and where the electrical appliances were plugged in. At one point, David stated that into the external outlet they connected an air-conditioner via a short extension cord and a power strip connected to, at various times, a computer, lamp and perhaps a fan. Other electric equipment in the living room were a television, a stereo, a printer, an overhead light fixture, a floor lamp, a table lamp and possibly two fans. David alternatively supposed that the computer was plugged into a second power strip that was connected to an extension cord that ran over a door into his son's bedroom. He also agreed that the television and stereo were connected by extension cord that via a ten to twelve-foot appliance-style extension cord that ran through the wall into the closet where the washer and dryer were located. He claimed they never had any problems with the wire molding or its living room outlet.

While apartment 2W was being renovated in the summer of 2013, David stated that he went up to investigate significant noises and vibrations above his apartment. He testified he observed exposed floor joists that were notched, and that plastic pipe being installed. He claims to have told worker that using plastic pipe was not up to code. His visit to apartment 2W lasted five minutes. He did not see any building permits displayed in apartment 2W when he visited. After the visit, David called Jeffrey to complain about the condition of the floor joists.

David averred that when the fire occurred, he and Ashley were away on vacation in Mexico City visiting their son, Jeremy. Staying in the apartment at the time as pet sitters for their two dogs and cat were Jessica Demorris ("Demorris") and her boyfriend Rocco Clauss ("Clauss"). Jessica, who was initially friends with Jeremy, previously resided in the apartment with David and Ashley for almost a year and watched the pets on that and previous occasions as a return kindness. David stated that on the day of the incident there were three operational battery-powered smoke alarms in apartment 1W which were in the living room, middle room, and front bedroom. He claimed that he changed the batteries in the detectors twice a year at the change of daylight savings time.

David stated that after they returned from Mexico, they met Demorris and Clauss to retrieve their dogs and spoke about what occurred. Neither David nor Ashley inspected the apartment after the fire. He testified that neither he nor Ashley were notified before the building

was demolished. David acknowledged he was interviewed twice by fire marshals with the New York City Fire Department ("FDNY") who were investigating the fire. David was showed the Interview Sheet that was prepared by the investigators and admitted his statement that the "apartment door is self-closing but does not close completely" was and remained accurate. Later in his deposition, David stated he could not remember whether the door closed all the way or not. He did state that he never reported the apartment door not closing to the landlord. He also vouched for the truth of the statements in the Interview Sheet regarding the electrical upgrades in the apartment he facilitated and admitted saying there were smoke detectors in "every room". David was showed the FDNY Fire Incident Report at his deposition and testified that based on the origin of the fire noted therein, the only thing he could think being in that area was the power strip the lamp was plugged into. He stated that power strip was one to two years old and had a switch, but not a surge protector.

David stated that during the time Gault managed the property, no employees visited apartment 1W and that they could not access the premises if they were not home. He said they sought maintenance from the landlord less than five times. David recalled that in 2012 a shed in the backyard behind the building to which they had exclusive access caught fire and that a fire marshal with the FDNY told him the cause was rodents that chewed through an electrical cord.

Ashley Shepherd's Deposition Testimony

Ashley Shepherd ("Ashley") testified that she is married to David and that they moved into apartment 1W in 1991. She averred that she had no role in any of the construction or electrical modifications testified to by David. Unlike David, Ashley had no experience in electrical work or construction of any kind. Ashley did not know whether a permit was obtained for the work performed in the kitchen and, to her knowledge, the work was not inspected by a licensed design professional or City inspector. She confirmed David's testimony on the layout of the apartment. Ashley had virtually no recollection of the location of electrical outlets in the apartment or the manner power to the electrical equipment in the apartment was arranged. However, she did indicate that there was no reason for her to disagree with David's descriptions of same. Ashley confirmed that before the upgrade to the electrical service in the kitchen was made, the lights in the apartment would dim and the problem ceased thereafter. She had no recollection of the lights flickering in any of the bedrooms.

Ashley confirmed that the apartment always had smoke detectors and agreed with David's testimony on the subject including his stated regimen for changing the batteries. She could not recall one way or another if the apartment door leading into the common hallway ever failed to entirely close when released. She also could not recall whether on any occasion she had to catch the door to keep it from slamming. Ashley had no memory of speaking to Jeffrey or anyone at the management company. She also had no recollection of any contractor sent by the landlord being in the apartment without her there. Ashley believed the common hallway had a smoke detector but was not certain.

Ashley confirmed that Demorris was pet sitting when the fire occurred and was aware Clauss was staying in the apartment as well. She had no recollection of the substance of any conversation she had with Demorris regarding the fire. Ashley was presented with David's

FDNY Interview Sheet and testified that other than some minor mischaracterizations, it was accurate. She opined that the building was "not in that great of shape" and averred that the level of general maintenance at the building by the landlord was declining and not to her liking.

Jessica Demorris' Deposition Testimony

Jessica Demorris testified that she met Jeremy when she lived around the corner from the Shepherds. She stated that she resided with the Shepherds as a guest when she moved back to New York from Florida. She averred that after moving to her own apartment, she agreed to watch the Shepherd's pets while they were away. Demorris testified that she had been in the apartment at least two, and possibly four or five, days prior to the fire and slept in the bedroom nearest the front of the building. She recalled the existence of electrical outlets in the living room and kitchen and stated that she used one near the computer. She initially acknowledged seeing an extension cord or power strip in the area where she slept. Later in her testimony, she stated it was not like a power strip, but rather a box with two outlets "with a trip thing on it", like a "toggle switch." Demorris averred that she recharged her phone in that unit and there was nothing else plugged into it. Demorris stated that the entrance door to the apartment shut automatically, all the way, every time. She could not remember a single instance during her temporary residency in the apartment or when pet sitting having to push the door shut; it "slammed behind closed always".

Demorris testified that when the fire started, she was asleep with Clauss and awoke around 3:20am to an alarm beeping sound. She acknowledged that she spoke to a fire marshal the night of the fire. She confirmed the statement in her FDNY Interview Sheet that the sound was a smoke alarm. Unsure where the sound was originating, Demorris alighted from bed and saw a line of fire along the hallway by the living room at the rear of the apartment. She agreed that her statement in the Interview Sheet that there was black smoke in the middle bedroom and hallway was accurate. Initially, she could not confirm the statement in the Interview Sheet that she saw a power strip in the fire. Later, she stated there was a power strip near the computer and bookcase. Demorris testified, after refreshing her recollection with the Interview Sheet, that, in contrast to her statement to the fire marshal, connected to the power strip were a computer, lamp, speakers and possibly Jeremy's guitar amp. Demorris admitted that the statement to the fire marshal regarding the power strip was a little inaccurate and embellished because Clauss did not want to be blamed for the fire. For the same reason, they described the apartment as cluttered and multiple things plugged in was a hazard. The initial deposition was terminated at that point so the witness could consult counsel.

When the deposition recommenced some three months later, Demorris claimed that her use of the word "embellishment" was incorrect and did not intend to deceive the fire marshal in any way. She also ostensibly retracted all her testimony regarding conversations that night by averring that she did not remember anything she said that night. Demorris clarified that her statements to the fire marshal were a mixture of what she and Clauss said. She also averred that when Clauss stated the Shepherds' apartment was dirty and untidy, she told him to "shut the fuck up". She initially claimed the statement in the Interview Sheet about the "cluttered, messy and unsanitary" condition of the apartment was more Clauss' than hers, but later confessed she probably made that statement. Demorris' description at the deposition was that the apartment

was "not the cleanest place, but it's not a complete shithole." Demorris also claimed that she no longer could be sure what was plugged into the power strip, but she denied bringing any electrical equipment of any kind to the apartment other than her cellular phone and charger. She also did not interfere with the power strips, extension cords or electricidal equipment that was in the apartment when she arrived. Ultimately, Demorris summarized her statements to the fire marshal as her best recollection at the time, but she could not verify its veracity at the deposition because she could no longer recollect that interaction.

Demorris described the fire she initially saw as waist-high, on the wood floor and emitting black smoke, but did not know how close the flames were to the wall. She could not recall if any electrical equipment was in the fire. Upon seeing the fire, she went to the kitchen and retrieved the fire extinguisher which she described as like a can of hair spray. When she returned the fire had grown. She attempted to use the extinguisher, but it failed to activate because it either broke or she used it incorrectly. At some point, she yelled to Clauss to get the dogs and leave the apartment. Soon thereafter, the fire spread, and she described that the entire doorway was engulfed in flames and Clauss sustained a burn on his right arm while exiting the apartment. Demorris was unclear how much time past from when she first heard the beeping to when they exited the apartment. She offered varying times of two, four and five minutes as well as estimating it was both less than five and ten minutes.

After exiting the apartment, Demorris stated they did not physically pull the door closed nor check to see if the apartment door closed because it was a self-closing door. Indeed, she admitted whether the door closed never occurred to her at that time. She averred that they ran up the hallway and exited the building to the street. She did not observe any fire in the hallway while exiting but noted she did not look behind her. Upon reaching the street, they each ran in opposite directions to call 911 since they left their phones behind. After listening to an FDNY "911" recording, Demorris admitted it was her voice on the call. She opined that the voice on another recording was not Clauss. Upon returning, they were unable to renter the building as front door locked. Demorris stated they saw the occupant of apartment 1E, Carmen Pisani ("Pisani") at her window and assisted her out the window. Demorris testified that Clauss told her that he broke the glass on the front door with a broom handle to re-enter the building and alert the other occupants.

In the few days before the fire, Demorris testified that the heat came on and that the apartment was uncomfortably hot. She also noted an odd smell, perhaps natural gas, emanating from the kitchen, but never reported it to anyone. Demorris denied using the electronics in the living room and stated none of the electronics in the living room were on when they went to sleep the night of the fire. She did notice that the living room ceiling light always buzzed, and it would occasionally and fleetingly dim randomly. Demorris testified that in all her time at the Shepherds' apartment she never saw a circuit breaker trip.

Carmen Pisani's Deposition Testimony

Carmen Pisani ("Pisani") testified that on the day of the fire she resided in apartment 1E of the subject building and had so for 50 years. She stated that one battery powered smoke detector was installed in her apartment but did not know about the ones in the common hallway

outside her door. She averred that the landlord never failed to change a battery in a smoke detector when she called. She testified that the door to her apartment was self-closing and she never complained about it to the landlord nor heard anyone else complain. She professed no knowledge about the operation of Shepherds' apartment door. Pisani recounted that there was a breaker panel in her apartment, and they never tripped. She professed no knowledge about whether the lights in her apartment ever flickered, hummed or crackled. She never complained about the electrical service to her apartment nor were any electrical repairs performed in her apartment.

Pisani stated she was acquainted with the Shepherds who leased the apartment across the hall and never complained to the landlord about them. She recalled the fire in the shed out back but was not there when it occurred. She first became aware of the fire in the Shepherds' apartment when awoken by screaming and yelling in the hallway. She did not hear any smoke detectors sounding. When she opened the door to the hallway to investigate, she saw the Shepherd's door was open as well as fire and smoke in their living room. Smoke was also spilling into the common hallway, and she noted it was hot. Then she heard someone say fire, fire. Pisani also recalled seeing the front doors of the building latched open. As smoke reached her, she closed her apartment door and collected her dog. Pisani testified that when she tried to open the door again it was jammed, so she went to her bedroom at the front of the apartment. She stated she opened the security gate, then the window and handed her dog to a man outside. Then she scrambled out the window and stood on garbage cans outside her window to reach the street. She estimated that five minutes or less passed from the yelling to her exiting the apartment.

Pisani was presented the FDNY Interview Sheet based upon her interview with a fire marshal on the day of the fire. She rejected the statement attributed to her that she heard a smoke alarm and stated it was the fire engine alarm. Later in her testimony, Pisani admitted she could not recall if her smoke detector sounded that night. She also clarified that smoke only entered her apartment when she opened the door and denied encountering Jessica, the woman house sitting for the Shepherds, as she climbed out the window. When confronted with her alleged statement that the landlord neglected the building and tenants turned over like a hotel, she stated, "I don't even speak like that" and "I didn't say those words". Pisani testified that she was never given the Interview Sheet to review.

Gregory Kraft's Deposition Testimony

Gregory Kraft ("Kraft") testified that he became acquainted with Decedent in 2014 when they interned at BlackRock Solutions Group as summer analysts. Kraft stated that he and Decedent became friends and remained in contact after the summer internship ended. Their association continued when they were both were hired full-time at BlackRock. In spring 2015, Kraft and Decedent decided to lease an apartment together and they began work at BlackRock on the same day in August 2015. Their first apartment was in Stuyvesant Town on a one-year lease which they shared it with a third roommate.

When the one-year lease expired in July 2016, Kraft and Decedent signed a lease for apartment 4W at 324 East 93rd Street. The apartment had two bedrooms and two bathrooms. He

stated that the door to the apartment did not self-close. He also stated that Decedent's bedroom also had a door that connected that room to the common hallway. He claimed they were not told the door was inoperable before signing the lease, but learned it was sealed shut soon after moving in. Kraft testified that he believed the window in Decedent's room which accessed the fire escape could open but was not absolutely certain. He also stated that he had no reason to believe that window would not open. Kraft acknowledged signing a rider to the lease that disclosed the building did not have a sprinkler system and that tenant was responsible for maintaining smoke detectors in the apartment, including changing the batteries. Kraft remembered the apartment had smoke detectors installed in every room and that his father tested most of the smoke detectors, but he was unsure if the one in Decedent's bedroom was tested. He was unaware if smoke detectors could also sense carbon monoxide and did not recall if they ever set off a smoke detector while cooking. He never changed the batteries in the smoke detectors, never witnessed Decedent do it either and did not remember if anyone else performed that task. Before the fire, Kraft never visited any other apartment nor knew any of the other occupants of the building. He also did not know whether other apartment doors were not self-closing. Kraft testified, at some point, he requested the building owner install electrical outlets in the back bathroom.

About a month prior to the fire, Kraft left his employment at BlackRock and began spending substantial time at his parents' residence in Massachusetts on a temporary basis. As a result, he was not at the apartment on the day of the fire. After the fire, in January 2017, Kraft attended a gathering at a bar that was organized by others in the neighborhood to provide relief for the building residents in the form of basic possessions and so forth. At that event, Kraft met his former building neighbors for the first time and was informed by Jason Love that the door to apartment 1W did not close completely during the fire. He also claimed to have learned from the neighbors, as well as the fire marshals or Decedent's family, the cause of the fire was a pile of clothes left on a power strip by the individual pet sitting at apartment 1W. He did not personally know the Shepherds, Demorris or Clauss nor did they attend the relief event.

Kraft was shown two pages that were marked at fire marshal Kenneth Hettwer's deposition which were identified as notes of his interview of Kraft in the presence of another fire marshal. He initially claimed uncertainty as to whether he told the fire marshal that Decedent placed a dresser in front of the inoperable door in his bedroom. Later in his testimony, he remembered Decedent wanted to move a dresser in front of the door, but Kraft advised against it because he wanted to get that door operational. They ultimately agreed Decedent could place the dresser in front of the door, but he would move it if the door were operational. Kraft claimed he requested, via email, that building management unseal the door, but it was never accomplished.

Justin Love's Deposition Testimony

Justin Love ("Love") testified that he and a roommate leased apartment 2W and that only he was at the premises on the day of the fire. He stated it was a two-bedroom apartment with one in the front of the building and the other at the rear. He stated his bedroom was in the front facing 93rd Street with access to the fire escape. Love stated that in addition to the main entrance to the apartment which opened into the living room from the common hallway, there was an additional door to the hallway in his bedroom which functioned. He stated the door into his

bedroom was self-closing, but the main door was not. He later testified that the main door would close self-close an inch or two and then stop. He averred neither he nor his roommate ever communicated with building management that the main door was not self-closing.

Love testified that he could only recall one smoke detector installed in his apartment which was in the kitchen. He was aware of that unit because it had gone off while cooking. He later testified the smoke detector had fallen off the wall at some point and they placed it on top of a metal cabinet. He also recalled definitively there was no other smoke detector in the apartment. He denied ever changing the battery in the smoke detector and did not remember the landlord either changing it or asking to change it. However, he also admitted never hearing it emit a low-battery chirp. He was not aware if carbon monoxide detectors were installed in his apartment. Love also claimed spontaneously that the smoke detector in the common hallway was chirping for one or two months immediately prior to the fire. Neither he nor his roommate ever contacted building management regarding that smoke detector. Love stated there were smoke detectors on other levels in the common hallway, but did not know how many, and did not hear them chirp.

Love recalled certain work done in his apartment by building management including fixing a leak, tile repair and installing an intercom, that ultimately did not operate. He did not remember any electrical issues in his apartment. He stated he loved the building and that it was relatively clean. Yet, he also testified about the presence of mice and cockroaches.

Love averred he knew Ashley Shepherd from encounters in the building but did not know David. He remembered the fire in the Shepherds' shed in their backyard and entered apartment 1W because of that event. He never observed whether the door to the Shepherds' apartment was self-closing, but he did note that it was "propped open" when the fire department responded to the shed fire. As to the other occupants of the building, he only acknowledged meeting James Duffy, an occupant of apartment 5W. Love stated that apartment 3W, the one directly above him, was an Airbnb "situation" and that he went up there to complain about noise several times. He did not observe whether the door to apartment 3W closed automatically when he visited to complain. Love never met Demorris or Clauss. He claimed never to have discussed smoke or carbon monoxide detectors or whether their apartment doors self-closed.

On the night of the fire, Love testified he was awakened at approximately 3:30am by the sound of a smoke detector sounding in the hallway. He thought the sound was emanating from both above and below. He rose from bed and as he put his shoes on, he heard breaking glass. After several minutes, Love exited to the common hallway to find the fire extinguisher and saw fire coming up the stairway. Love also claimed he heard the "girl" in apartment 1W and her "boyfriend" when they ran out. He also thought he heard "fire, fire, we have to get out", but noted he was still groggy. He testified that he did not recall seeing smoke at that point. However, when showed his FDNY Interview Sheet, Love acknowledged telling FDNY personnel that he saw thick, black smoke. He clarified that when he realized the fire extinguisher would be no use, he returned to his apartment, shut the main door, opened the bedroom door, and then saw the smoke which entered his bedroom. After closing the bedroom door, he dressed, called 911 and exited the apartment onto the fire escape. Love estimated that between five and

seven minutes passed from waking up to exiting via the window. He stated that as he descended to the street no flames impeded his progress and he released the fire escape ladder to the street.

Love stated that before the fire the heat had recently come on in the building and that it was hot. He testified that he used his air conditioner in the past to compensate for the heat but could not remember whether it was in use the night of the fire. He also could not recall if the power was out in the building when he awoke. Love admitted his NYFD Interview Sheet recounted him saying to the fire marshal that on the night of the fire, his air conditioner was on, and the building power was out. Love stated that his statement in his Interview Sheet that the occupants of apartment 3W were yelling was incorrect. He also professed, with uncertainty, that the statement about the power being out in the building was incorrect. He also explained that the timing of seeing of flames shooting out of windows above and breaking glass was incorrect. He averred those observations were made while in his apartment through the windows that opened onto the air shaft, not while on the fire escape.

Love testified he attended the gathering that was organized for the building residents and speaking to some of the other occupants. He remembered speaking to a first-floor tenant of fifty years, "Carmine", Kraft and an unidentified individual he believed was a firefighter. Among other things, they traded information and speculation about the cause of the fire. Love claims Kraft stated the Decedent was a heavy sleeper.

Kenneth Hettwer's Deposition Testimony

Kenneth Hettwer ("Hettwer") testified that he was employed by the New York City Fire Department as a fire marshal on October 27, 2016. He stated that he joined the FDNY in 1994, became a fire marshal in 2012 and remained in that position at the time of his deposition. He averred that one of his duties was to investigate the origin and cause of fires. As of the date of his testimony, Hettwer stated he conducted some 400 fire investigations and assisted on another 400. He averred that he proffered expert opinion testimony in approximately 15 criminal trials.

Hettwer arrived at the fire scene at about 4:00am while FDNY personnel were still extinguishing the blaze. He stated that numerous other fire marshals as well as a supervisor and commander were present at the scene. Hettwer was assigned as lead investigator of the incident. While conducting his inquiry, Hettwer took handwritten notes. His inspection of the building began on October 27th while the fire was still being contained. He stated that the initial inspection was brief because the building had to be made stable and cleared by NYCDOB for the safety of FDNY personnel. He stated that the building was constructed around 1910[2]. On initial inspection, he did not recall seeing evidence in the first-floor apartment, or anywhere else in the building, of smoke alarms.

Hettwer stated that he and other fire marshals took statements from multiple witnesses. Hettwer stated he interviewed Demorris and Clauss at the location on the day of the fire. He also interviewed Demorris by phone two or three days after the fire. In the notes he took during the inquiry, he recorded that Demorris stated that before the fire she picked up some clothes and

[2] NYCDOB records reveal that the building was in existence on February 29, 1912, but do not appear to contain an exact construction date.

placed same under a power strip that was resting on a chair near the computer desk. Hettwer also chronicled in his notes that Demorris said the power strip had four or five outlets which were all filled. His notes also included a statement that an air conditioner was plugged into the power strip via a grey extension cord.

Hettwer testified that a physical examination of apartment 1W was conducted on November 12, 2016. He began his inspection in the front bedroom and noted in his report "heavy fire damage in the flow path, the front window". Flow path is the route taken by a fire through a structure and is analyzed through fire patterns on the walls, ceilings, and door frames. Hettwer continued his examination towards the rear of the building in the middle bedroom also noting "heavy fire damage in the flow path through the room". In the kitchen, he observed heavy oxidation to the front of the appliances and heavy charring on the ceiling which he stated was an indicator of high heat. In the narrowest room in the apartment, which resulted from its location adjacent to the north air/light shaft, Hettwer observed "electrical practices that didn't seem correct", to wit the routing of an electrical cord in the loft as well as Romex and BX cable in the ceiling.

In the room between the kitchen and narrow room, Hettwer saw the main door to the apartment was heavily oxidized on both sides and the presence of a V-pattern on the west wall over a bed/couch, which, in conjunction with other factors, can be an indicator of fire origin. In the same room, he noted that a dresser/CD shelf was damaged by fire from above and in the flow path which he testified pointed to the fire starting from the V-pattern and spreading across the room towards the kitchen. This also explained why the lower part of the dresser was less damaged. Hettwer testified that the factors he considers in determining fire origin is location of a V-pattern, an area of "low burn low char", fire drop out, fire traveling across a room, flash over and witness statements. He described that the presence of low burn and char indicates the fire started low to the floor and is a major factor in determining fire origin. He noted the presence of deep char in photographs H-40 and H-41.

Hettwer opined that an electrical outlet depicted in the photos which was within the deep char area was not the origin as there was no oxidation inside the outlet or major damage to the metal encasement. In addition, he stated that fire impinged on the outlet from the outside. Hettwer identified within the area of deep char the presence of a power strip, melted plastic, a box fan, a lamp and insulated wire covered by carpet. He acknowledged that fire personnel could have moved those items from their original positions while extinguishing the fire. Hettwer identified the presence of baseboard wire molding in post-fire photographs of the living room. He testified that it was melted and showed evidence of arcing. He stated the location of the arcing was "inside" or "very close" to the fire origin area. Hettwer could not discern whether the wire molding in the fire origin area was attached to the wall before the fire nor could he opine whether the arcing of that molding wire was caused by the fire or vice-versa. Hettwer averred that the hot-water heater and furnace were ruled out as causes of the fire due to their location in the basement remote from the fire origin. Natural gas was also not a cause of the fire based upon witness statements and the absence of fire patterns that would indicate the presence of gas.

Regarding the spread of the fire outside apartment 1W, Hettwer testified that it traveled through the open apartment door into the interior hallway and up the stairway. Thereafter, up the

exterior air shaft between the subject and adjacent building in that order. He also added later in his testimony that the fire additionally spread through wall and floor voids. Hettwer opined that the fire reached the air shaft because all the windows facing same broke due to the heat of the fire. Hettwer concluded the door to apartment 1W was left open based upon witness statements, including firefighters who were present, and in-progress photographs from building occupants. Hettwer said the door was metal clad and fire-resistant, but not fireproof. He was uncertain if NYCDOB regulations required apartment doors to be self-closing and stated no analysis was made of the hinges on the door to apartment 1W. Hettwer testified that whether an apartment door is closed during a fire is relevant to fire investigation as it affects the dynamics of the fire. He stated a closed-door limits oxygen to the fire and inhibits the spread into common areas. He noted that an open window could have a similar effect on the spread of a fire. Hettwer offered that when the front door of the building was opened by FDNY personnel, it affected the spread of the fire out the apartment door by adding more oxygen to the fire. He stated the air shaft window would have still have eventually failed if the door to apartment 1W was shut and was unable to opine as to whether a shut door would have affected the speed of the failure. However, he stated that a closed door would have extended the timeframe in which the fire spread to the hallway.

Hettwer testified that he and other fire marshals interviewed other lessees and occupants of the apartment, including a Ms. Goldenberg, Mr. Yurkovsky and Mr. Duffy. Hettwer averred that Ms. Goldenberg informed FDNY personnel that she and her roommate were awakened in apartment 2E by a smoke alarm at about 3:30am the night of the fire, were repelled by thick black smoke in the hallway and exited the building via the fire escape. Hettwer stated that Mr. Yurkovsky admitted to listing apartment 3W for lease on AirBnB. Mr. Duffy, the occupant of apartment 5W stated he was removed from the building by FDNY personnel via rope rescue. Hettwer testified that he interviewed Mr. Portelli who stated he was the superintendent of the building. He recounted that Portelli was not present at the time of the fire but was there earlier in the day to collect garbage. Portelli denied any knowledge of any electrical, hearting or plumbing problems in the building. Hettwer did not recall Portelli informing him about apartment doors not closing completely. He also did not ask Portelli whether there was any history of such complaints. Fire Fighter Cahill was interviewed as part of the investigation who revealed that he found Decedent's body. Cahill recounted that Decedent was found at the bottom of the hallway stairs on the third floor with his feet closer to the stairs.

At the conclusion of his investigation, Hettwer prepared a report regarding the origin and cause of the fire. It was based upon his observations at the fire scene, witness statements, including FDNY and Con Ed personnel, review of NYCDOB records, floor plans, as well as post-fire photographs and video taken by FDNY personnel. Hettwer acknowledged his conclusion in the Fire Incident Report, that the fire origin is described as "in the living room approximately one foot from the north wall and one foot from the west wall at floor level in a combustible material (electrical cord insulation)". He also confirmed that the report stated "Electrical" under the title "Cause of Fire". Under the title "Description", which immediately followed is noted "NFA in the area of electrical wiring – extension cords and power strips". Hettwer testified that "NFA" is an acronym for "not further ascertained" which in that context meant that no further testing or evaluation of the electrical wiring was performed. He averred that one of multiple reasons the fire was NFA was because it could not be ascertained whether

the baseboard molding wire was attached to the wall. Hettwer stated that he could not opine exactly which electrical item –ie. power strip, extension cord, wire molding or electrical appliance-- in the fire origin area caused the fire. He added that if Demorris or Clauss had informed him that the statement regarding clutter in the apartment and things on top of electrical equipment was inaccurate it would not change his opinion as to what caused the fire. Hettwer stated that his "degree of confidence" in his conclusion that the cause of the fire was "electrical NFA" was "[o]ver 51 percent".

II. EXPERT REPORTS

Plaintiff's Expert – Richard Robbins, R.A. – Architect

In support of its opposition to Defendants' motion and cross-motion, Plaintiff proffered an affidavit from Richard Robbins ("Robbins"), a licensed architect. Robbins averred that the purpose of his affidavit was "to set forth the applicable codes and the defendants' violations of those codes." In support of his opinions, Robbins stated he reviewed NYCDOB records, the Fire Incident Report, the affidavits of Defendants' experts. Robbins opined that Defendants violated NYC Administrative Code 28-144.1 by not obtaining permits for relocating gas and electrical lines as well as installing second bathrooms in certain apartments. He also posits that "at the very least" the 2014 NYC Building Code applies regardless of when the building was constructed. Robbins offered no opinion or evidence as to when the building was constructed.

Robbins opined that Defendants were required to maintain self-closing fire doors on all the apartments. This conclusion was based upon section 28-301.1 of the NYC Building Code, Multiple Dwelling Law §78 and section 27-2005 of the NYC Housing Maintenance Code. Robbins also claims Defendants violated multiple sections of "NYC Fire Code" and "National Fire Protection Association 80" which he asserts is incorporated into the "NYC Fire Code" by reference. Additionally, Robbins opined that that when Defendants performed renovations to apartment 2W, they were required to install proper and safe fire-stopping measures which would have prevented the fire in apartment 1W from spreading through floor and wall voids. In support of this claim, Robbins relies on Multiple Dwelling Law §152, section 27-345 of the 1968 NYC Building Code and 2014 NYC Fire Code 29 §703.1.

Robbins also proffered a three-sentence conclusory assessment that the opinions of Defendants' experts have no merit.

Plaintiff's Expert – Michael Cronin – Fire Safety Expert

Plaintiff also submitted an affidavit from Michael Cronin ("Cronin") who was employed by the FDNY for 32 years ultimately achieving the rank of assistant chief of department. Cronin averred his duties with the FDNY included knowledge of fire growth and development, fire suppression techniques, fire ground command, cause and origin, and training as well as knowledge of the New York Building Codes, Multiple Dwelling Law and applicable Fire Code. In support of his opinions, in addition to his experience, Cronin relied on "the Bills of Particulars, the FDNY fire incident reports and Incident History reports, witness interview

sheets, the autopsy report, deposition and exhibits of Fire Marshal Hettwer, photographs, and other numerous documents".

Cronin averred that the building was an "old law tenement" which contained ten Class "A" rental units. He proffered opinions that the fatal acceleration of the fire was precipitated by the defective self-closing door on apartment 1W and lack of proper fire-stopping in the building in general. He also offered observations regarding the advantage gained by Defendants' expert's access to the building and the deleterious effect demolition of the building had on his ability to render an expert opinion.

On the self-closing door, Cronin based his conclusions on, *inter alia*, multiple sections of the New York City Fire Code and National Fire Protection Association standards to conclude the failure of the door to apartment 1W to automatically close completely was a code violation which was a proximate cause of the fire and smoke spread and denied Decedent necessary time to escape the building through the main stairway. As a corollary, he posited that Hettwer stated that egress by the fire escape by Decedent may not have been viable.

Cronin opined that "if" Defendants' contractors failed to properly install fire-stopping materials when they renovated apartment 2W, that was a cause of the fire spreading. He speculated that voids through which fire can spread can be created during renovations. Yet, he admitted voids can exist from when the building was initially constructed. Like Robbins, Cronin relied on the Multiple Dwelling Law, section 27-345 of the 1968 NYC Building Code and 2014 NYC Fire Code 29 §703.1 to support this proposition.

Cronin noted that Defendants' experts had access to the building for some eleven days after the fire before it was demolished, and Plaintiff's family was not notified of the demolition. He offered that this lack of access impacted the significance of his opinions. Globally, Cronin resolved Defendants' failure to maintain the door to apartment 1W and install fire-stopping materials were a proximate cause of Decedent's death.

<u>Defendants' Expert – William P. Nolan – Certified Fire Investigator</u>

The affidavit of William P. Nolan ("Nolan"), a certified fire investigator, was offered by Defendants is support of their motion for summary judgment. An additional affidavit from Nolan was submitted in opposition to the cross-motion and in response to Robbins' affidavit. Nolan averred that his opinions were based upon, in addition to his training and experience, *inter alia*, virtually all the evidence submitted in support of Defendants' motion as well as numerous other documents, photographs and videos which were not submitted to the Court. Nolan offered opinions on the origin and cause of the fire, the smoke detectors, the self-closing doors, the spread of the fire, the inoperability of Decedent's bedroom door as well as other matters.

Concerning the origin and cause of the fire, Nolan opined that the cause of the fire was electrical in origin, but not because of the wiring in the building. He claims to concur with Hettwer that the electrical outlets in area of apartment 1W where the fire began did not show evidence of being the origin of the fire. Rather, he stated, as did Hettwer, that the fire initiated away from the walls. He asserted this conclusion is supported by the lack of evidence of any

other cognizable ignition sources, like smoking or candles. Nolan also averred that the electrical work performed by the Shepherds was unrelated to the fire and performed before Defendant owned the property. On the renovation work, Nolan posited that even absent permits, there is no evidence that the work performed by Defendants in other apartments was a cause of the fire.

As to smoke detectors, Nolan stated that occupants of three different apartments in the premises testified they heard smoke detectors sound and it awoke them from their sleep. He also noted that a smoke detector was present Decedent's apartment, and it was tested before occupancy. Consequently, he opines any smoke detector failure was not a cause of injury to Decedent.

Regarding the self-closing door and spread of the fire, Nolan did not opine that that the door to apartment 1W was closed nor that it being open, even partially, had no effect on the spread of the fire. Instead, Nolan focused on lack of notice by Defendants of any defect in the operation of the door and a resultant inability to remedy any defective condition. He also agreed with Hettwer's opinion that even if the door were closed, the fire would have eventually spread through other spaces.

Nolan averred that Decedent's sealed bedroom door did not violate any applicable statute or code since there were two other avenues of egress from the apartment to wit, the apartment door and fire escape. He opined a window which opened on to the fire escape was in Decedent's bedroom and was unobstructed. Overall, Nolan concluded Defendants did not cause the fire and were not the proximate cause of the accident.

In reply to Plaintiff's expert affidavits, Nolan did not specifically address the statutory and code sections allegedly violated. Nolan reiterated his opinion that there was no evidence explaining why the door to apartment 1W did not close and that Defendants were not on notice of any defect in the operation of the door. Nolan further averred that no renovations were performed by Defendants to apartment 1W and that there is no affirmative proof fire-stopping material was not installed when the other apartments were renovated. He also posited that lack of fire-stopping did not cause Decedent's injuries as the primary avenues of the spread of the fire were the open door and air shaft. On evidence access, he admitted he inspected the building before it was demolished, but noted his examination occurred after the FDNY investigation and was for a total of ten to fifteen minutes.

Defendants' Expert – Steve Pietropaolo, P.E. – Professional Engineer

Steve Pietropaolo ("Pietropaolo"), Defendants' engineering expert relied on virtually the same evidence as Nolan as foundation for his opinions and conclusions. In sum and substance, Pietropaolo opined, without significant detail, that as of the date of the fire, there were no statutes, rules, codes or ordnances that required owners of multiple dwellings, like Defendants, to: inspect a building's wiring, inspect each tenant's premises for potential electrical overuse or alterations, inspect smoke detectors after a tenant takes possession, to have interconnected smoke detectors, to install sprinklers, to fireproof the building or to inspect self-closing doors absent notice of a problem. Pietropaolo also averred that Defendants installation of smoke detectors followed applicable code and that Decedent's apartment had the required means of egress.

In reply, Pietropaolo proffered a more comprehensive affidavit which addressed the issues of the self-closing door, fire-stopping measures, the general obligation to maintain a safe premises and Defendants' failure to obtain permits for renovations performed in other apartments. Pietropaolo averred that Plaintiff's reliance on sections 703.1 and 703.2 of the New York City Fire Code regarding maintenance of self-closing doors was misplaced as those sections were not applicable to an "old-law tenement" building at issue. Additionally, he opined that, contrary to Plaintiff's experts' assertions, the New York City Fire Code does not adopt National Fire Protection Association standards regarding self-closing door inspection by reference. He posited that if that were the case, the City of New York would not have needed to adopt the self-closing door inspection requirements in section 27-2041.1 of the NYC Administrative Code in 2019.

Pietropaolo averred that reliance by Plaintiff's experts on the 2014 Building Code is mistaken as, given the age of the building, the 1968 Building Code is applicable. He opined that the uncontradicted evidence does not demonstrate that the renovations triggered an obligation to bring the entire building up to presently applicable Building Code. Pietropaolo stated that the claim of inadequate fire-stopping measures in the building is not supported by any proof of the lack of same. He notes David Shepherd's observations of the on-going construction in apartment 2W was indicative of nothing and that Cronin's conclusions were expressly premised on an assumption of a lack of fire-stopping measures.

Defendants' Expert – Vincent Fiorentino – Fire and Life Safety Consultant

For the first time in reply, Defendants proffered the affidavit of Vincent Fiorentino ("Fiorentino"), a fire and life safety consultant. Fiorentino averred he reviewed, *inter alia*, the affidavits of Robbins and Cronin and opined that the sections of the New York City Fire Code they relied on were inapplicable because the condition of the self-closing door and fire-stopping measures were lawful preexisting conditions and there is no evidence of any changes to these conditions after adoption of the Fire Code in 2008. He reiterated Pietropaolo's conclusion that application of the specific sections relied on by Plaintiff was inappropriate as those sections address fire-resistant related assemblies as defined therein which were not part of the building because of its age.

III. ANALYSIS

DEFENDANTS' MOTION

Liability

While it is ultimately a plaintiff's burden at trial to establish a *prima facie* case of negligence against a defendant, on a motion for summary judgment it is incumbent upon the moving party to present evidence in admissible form showing their entitlement to judgment in its favor as a matter of law (*see Zuckerman v City of New York*, 49 NY2d 557). In support of their motions, Defendants were required to demonstrate *prima facie,* that one or more of the essential elements of Plaintiff's negligence claim are negated as a matter of law (*see eg Poon v Nisanov*,

162 AD3d 804 [2d Dept 2018]; *Nunez v Chase Manhattan Bank*, 155 AD3d 641 [2d Dept 2017]). Failure to make such a showing requires denial of the motions regardless of the sufficiency of the opposition papers (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *see also Smalls v AJI Industries, Inc.*, 10 NY3d 733, 735 [2008]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce proof, in admissible form, which establish the existence of material issues of fact (*see Giuffrida v Citibank Corp.,* 100 NY2d 72 [2003]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

It is well established that a "a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, which include the likelihood of injury to a third party, the potential that such an injury would be of a serious nature, and the burden of avoiding the risk," (*see Smith v Costco Wholesale Corp.*, 50 AD3d 499 [1st Dept 2008] *citing Basso v Miller,* 40 NY2d 233, 241 [1976]). That duty is premised upon the landholder's exercise of control over the premises since "the person in possession and control of property is best able to identify and prevent any harm to others" (*see Butler v Rafferty*, 100 NY2d 265, 270 [2003]).

Generally, at common law, "a landlord is not liable to a tenant for dangerous conditions on the leased premises, unless a duty to repair the premises is imposed by statute, by regulation or by contract" (*Rivera v Nelson Realty, LLC*, 7 NY3d 530, 543 [2006]). In New York, that duty is established under Multiple Dwelling Law §78[1] which requires the owners of such buildings "be kept in good repair". New York City landlords are further charged under the Administrative Code with the responsibility for safe maintenance of their buildings and facilities (*see* NYC Administrative Code §§ 27-127, 27-128). However, this section does not render the landlord an insurer who is liable for every accident on its property and no duty exists absent proof of a specific defect in the building in need of repair, an obligation in the lease, or by virtue of a specific code, rule or regulation (*see eg Rivera v Nelson Realty, LLC,* supra; *Rodriguez v City of New York*, 20 AD3d 327 [1st Dept 2005]; *see also Milano v 340 E. 74th St. Owners Corp.*, 158 AD3d 479 [1st Dept 2018]; *Balleram v 11P, LLC*, 143 AD3d 432 [1st Dept 2016]; *White v New York City Hous. Auth.*, 139 AD3d 579 [1st Dept 2016]).

Plaintiff's position that Defendants had a duty to perform a comprehensive upgrade of the electrical system on the entire building is entirely unsupported by any statute, code rule or regulation (*see Liu v DMHZ Corp.*, ____Misc3d____, 2013 NY Slip Op 31323[U][Sup Ct NY Cty, 2013]). Further, neither of Plaintiff's experts offered a sufficiently founded opinion to support such a bold claim. On the contrary, it is established that "[i]f a building was constructed in compliance with code specifications and industry standards applicable at the time, the owner is under no legal duty to modify the building thereafter in the wake of changed standards" (*Hotaling v City of New York*, 55 AD3d 396, 397 [1st Dept 2008]). Applicable industry standards can create a duty in the absence of an applicable law or code, but Plaintiff's experts offered no "concrete proof" of the existence of a generally accepted standard requiring Defendant to entirely re-wire a century-old building to meet the needs of modern tenants (*id* at 398). Plaintiff's reliance on *Daly v 9 E. 36th LLC*, 153 AD3d 1145 [1st Dept 2017] to support such a claim is unavailing as that court rendered no such holding. Rather, under the facts presented therein, the court determined that an issue of fact existed as to whether the building owner fulfilled its duty under Multiple Dwelling Law §78[1] to keep the premises in good repair.

As it concerns this incident, Defendants established *prima facie* that it did not neglect its duty with respect to the electrical system in apartment 1W and that the internal wiring in the building was not the cause of the fire (*see Zvinys v Richfield Inv. Co.*, 25 AD3d 358 [1st Dept 2006], *lv denied* 7 NY3d 706 [2006]; *see also Mirdita v Musovic Realty Corp.*, 171 AD3d 662 [1st Dept 2019]; *Robertson v New York City Hous. Auth.*, 58 AD3d 535 [1st Dept 2009]; *Andrews v New York City Hous. Auth.*, 66 AD3d 619 [2d Dept 2009]; *Delgado v New York City Hous. Auth.*, 51 AD3d 570 [1st Dept 2008]; *Butler-Francis v New York City Hous. Auth.*, 38 AD3d 433 [1st Dept 2007]). Defendants also demonstrated an absence of notice of electrical defects in apartment 1W (*see Zvinys v Richfield Inv. Co.*, supra at 359). David Shepherd testified that he sought maintenance from the landlord less than five times and denied experiencing any problems with the baseboard electrical molding in the living room. Demorris testified that no circuit breaker ever tripped when she resided at the apartment. Defendants proffered an affidavit from Jeffrey wherein he claimed he received no complaints and was not aware of any problems with the electrical service in apartment 1W. Defendants also demonstrated that they did not create the condition that caused the fire. The testimony of David Shepherd and Jeffrey demonstrated that the Shepherds, not Defendants, performed electrical repairs in the apartment, that the baseboard wire molding was not installed by Defendants and that the extension cords and power strip were provided and installed by the Shepherds. On the origin of the fire, Hettwer's report and testimony, as well as the report from Defendants' expert Nolan, are clear that the fire originated away from the walls of the building in the area where a power strip installed by the Shepherds was located. Hettwer specifically stated that the electrical outlet in the fire origin area was not the source of the fire. Nolan opined that evidence of arcing in the baseboard wire molding away from the outlet is also proof excluding the building wiring as a cause of the fire.

In opposition, Plaintiff's proffered no evidence of any specific defect with the electrical service in apartment 1W, or any complaints related thereto. Plaintiff argues that since Defendants were aware of the faulty nature of the electrical service in the building generally, it is charged with knowledge of the specific condition in apartment 1W. Plaintiff's reliance on this principle, and the case law in support (*see eg Hermina v 2050 Valentine Ave. LLC.*, 120 AD3d 1131, 1132 [1st Dept 2014]), is misplaced. Here, there is no proof that any other tenants employed the type of Jerry-rigged extension cord/power strip like the Shepherds and reported problems with same before the fire. Moreover, this argument ignores that there no proof, expert or otherwise, that insufficient or defective electrical service in the building was the origin of the fire. Reliance on *Daly* is again misplaced as that case is factually distinct. In that case, no electrical upgrade had been performed in the apartment where the fire started since its construction in the 1930s and the tenant of the apartment requested additional outlets be installed on multiple occasions, but the landlord refused because of the cost. The insufficient number of outlets necessitated the use of extension cords, and the tenant informed the superintendent that extension cords would get "hot" if used for long periods which made the tenant uncomfortable. The Plaintiff in *Daly* also demonstrated that complaints were made once or twice a week about blown fuses in the apartment, that the superintendent testified the air conditioner was the cause and that he advised Plaintiff not to use too many appliances at one time. In this case, the Shepherds expanded their electrical service before Defendants owned the premises and there is no evidence that the Shepherds complained about their electrical service or experienced any problems with the electrical service in apartment 1W after the upgrade.

Plaintiff also failed to raise an issue of fact that Defendants created the electrical condition that caused the fire. It is undisputed that Defendants performed no electrical or renovation work in apartment 1W prior to the fire. Plaintiff also failed to demonstrate that the renovations performed in apartments on other floors were a proximate cause of the fire. Plaintiff's experts offer no opinion as to how these renovations affected the electrical service in the building, apartment 1W or, most importantly, how it was a substantial factor in originating the fire.

On the issue of smoke detectors, Defendants were required to comply with New York City Administrative Code § 27-2045[a]. That section obligates the owners of class A multiple dwellings to provide and install an operational smoke detector in each dwelling unit when a tenancy commences (NYCAC §27-2045[a]). However, "[o]nce the owner fulfills its statutory obligation to provide a smoke detector, the occupant of the dwelling unit becomes solely responsible for its maintenance and repair of the device" (*see Peyton v State of Newburgh, Inc.*, 14 AD3d 51, 53 [1st Dept 2004]). Here, the testimony of all the tenants and occupants on the day in question confirmed the presence of smoke detectors in their respective apartments. Kraft's testimony evidenced that smoke detectors were installed and operational in Decedent's apartment. Thus, Defendants proved they satisfied their statutory duty under the circumstances (*see eg Poree v New York City Hous. Auth.*, 139 AD3d 528 [1st Dept 2016]). The deposition testimony of Demorris and Love confirm that a smoke detector sounded the night of the fire and stirred each from their sleep. As such, there is proof, in the first instance, that any claimed statutory violation in this regard was not a proximate cause of Decedent's injury and death. Plaintiff failed to raise any facts or substantive arguments in opposition to this *prima facie* showing (*see Robertson v New York City Hous. Auth.,* supra at 536).

Plaintiff's claims based upon the absence or insufficiency of fire-stopping materials, absence of a sprinkler system, inoperability of Decedent's bedroom door and access to the fire escape are defective as a matter of law (*see Buchholz v Trump 767 Fifth Ave., LLC*, 5 NY3d 1, 7 [2005][Applicability of codes and statutes issue of law for court]). Defendant established that all the building and fire codes cited on the issue of fire-stopping materials and sprinklers are inapplicable to this building due to its age (*see Ndiaye v NEP W. 119th St. L.P.,* 145 AD3d 564 [1st Dept 2016]; *Rivera v Bilynn Realty Corp.*, 85 AD3d 518 [1st Dept 2011]). The evidence adduced on the motion also proved the issue of Decedent's bedroom door and fire escape is unavailing as apartment 4W complied with Multiple Dwelling Law §146 and the fire escape could be reached via a window in Decedent's bedroom. In opposition, Plaintiff failed to proffer any evidence that the renovations performed by Defendants resulted in a "change in the occupancy group classification" which would have required the building to be updated to code applicable at the time (*see* NYCAC §27-118[a]; *Ndiaye v NEP W. 119th St. L.P.*, supra at 565) or that the existing fire-stopping was damaged during the renovations. Moreover, Plaintiff's experts failed to offer any sustainable opinion that prevailing industry standards required the building to be retrofitted with fire-stopping materials (*see Hotaling v City of New York*, supra) and Plaintiff failed to raise an issue of fact on any of the other issues.

In support of the branch of their motion to dismiss Plaintiff's claims based upon the door to apartment 1W, Defendants do not argue that a self-closing door was not required (*see* NYCAC §27-371[b]; *see also* Multiple Dwelling Law §§4[11], 238). Therefore, unlike the issue of the

building-wide electrical system, Defendants had a duty, established by code and/or statute, to provide self-closing doors in the building. Defendants were, therefore, required to establish that no defect existed in the operation of the self-closing door to apartment 1W and/or that it did not create or have actual or constructive notice of a problem with the operation of the door (*see eg Hunter v Riverview Towers, Inc.*, 5 AD3d 249 [1st Dept 2004]).

Defendants' assertion that the deposition testimony established the door to apartment 1W would "always" self-close is only partially correct. Demorris testified that the door "always" shut. David Shepherd was less clear. At his deposition, he initially testified that he could not "recall" an instance when the door stayed open. However, he also admitted that the statement in his interview with FDNY personnel that the door did "not close completely" was accurate. Later still in his deposition, David claimed he did not remember whether the apartment door closed completely. On the night in question, there is virtually unchallenged testimonial proof and expert opinions to support that the door to apartment 1W did not close. This evidence is not sufficient to demonstrate that a defective condition with the self-closing mechanism on the door to apartment 1W did not exist (*see Gorokhovskiy v NYU Hosps. Ctr.*, 150 AD3d 966 [2d Dept 2017]).

Defendants also assert that an absence of notice of a problem with the operation of the door to apartment 1W prior to the fire absolves it of Plaintiff's claim of common-law negligence. To establish a *prima facie* case on the issue of notice, the Defendants were required to demonstrate that they lacked both actual and constructive notice[3] of Plaintiff's claimed defect in the self-closing mechanism of the door to apartment 1W (*see Gordan v Am. Museum of Nat. History*, 67 NY2d 836, 837-838 [1986]; *Mitchell v City of New York*, 29 AD3d 372 [1st Dept 2006]; *Vantroba v Zodiaco*, 193 AD3d 1014 [2d Dept 2021]). On actual notice, Defendants established with the deposition testimony of Jeffrey, Demorris and David Shepherd that they had no actual notice of any problem with the door to apartment 1W. With respect to the other apartments, Pisani and Love testified that they never complained about their apartment doors to the landlord, despite Love stating his apartment door never self-closed. Also, Kraft averred that he never complained to the City of New York that the door to his apartment was not self-closing.

Constructive notice of a defect exists "when it is visible and apparent, and has existed for a sufficient length of time before the accident such that it could have been discovered and corrected" (*see eg Kyte v Mid-Hudson Wendico*, 131 AD3d 452, 453 [2d Dept 2015]; *see also Gordan v Am. Museum of Nat. History,* supra). Ergo, to establish, *prima facie*, an absence of constructive knowledge, Defendant was required to evidence that the defect was not perceptible for a sufficient length of time to remedy same, or the defect was latent and "would not be discoverable even upon a reasonable inspection" (*see Bean v Ruppert Towers Hous. Co.*, 274 AD2d 305 [1st Dept 2000], *citing Ferris v County of Suffolk*, 174 AD2d 70, 76 [2d Dept 1992]). In this case, Defendants failed to proffer any evidence to support its lack of constructive notice. Jeffrey testified that Defendants never inspected the building prior to taking title, he did not even know if the doors to the apartments self-closed and he never personally entered apartment 1W.

[3] Ordinarily, this issue also requires Movant to demonstrate it did not create the defective/dangerous condition at issue (*see eg Mayer v New York City Tr. Auth.*, 39 AD3d 349 [1st Dept 2007]). Here, there is no claim or dispute that Defendants created the condition by either installing, not installing, or negligently repairing the self-closing door at issue.

Defendants failed to proffer any affidavit or other evidence that the operation of any door in the building was ever tested or examined from the time Defendants acquired the property until the fire. As such, failing proof of any reasonable inspection whatsoever, Defendants have failed to establish, *prima facie*, they lacked constructive notice of any problem with the door to apartment 1W (*see Gorokhovskiy v NYU Hosps. Ctr.*, supra; *see also Fasano v St. Bernard Church*, 169 AD3d 645 [2d Dept 2019]; *cf. Hunter v Riverview Towers, Inc.*, 5 AD3d 249 [1st Dept 2004]; *Donnelly v St. Agnes Cathedral Sch.*, 106 AD3d 773 [2d Dept 2013]). Defendant's assertion that there was no specific code or ordinance which required the self-closing mechanism of the apartment doors to be inspected "is not dispositive of a plaintiff's allegations based on common-law negligence principles" (*see Alexis v Motel Oasis*, 143 AD3d 926, 927 [2d Dept 2016], *citing Jacqueline S. v City of New York*, 81 NY2d 288, 293-294 [1993]).

To the extent Defendant claims the failure of the door to close was not a proximate cause of injury or death to Decedent, entitlement to dismissal as a matter of law has not been established on this record. A defendants' negligence does not have to be the sole cause of an injury, only *a* cause of an injury (*see generally Derdiarian v Felix Contractor Corp.*, 51 NY2d 308 [1980]). There is ample evidence, particularly from Hettwer and Cronin, that the fire spread more rapidly because the door to apartment 1W failed to close and affected the main escape route from the building, which Decedent's body was discovered.

<u>Punitive Damages</u>

Defendants move to dismiss any claim of an award for punitive damages based upon Plaintiff's alleged failure to plead same and on the merits of the facts adduced.

Plaintiff's claim for punitive damages was alleged for the first time in his third supplemental bill of particulars, dated March 11, 2020. "It is well settled that a supplemental bill of particulars may be used for purposes of updating 'claims of continuing special damages and disabilities', but may not be used for adding new injuries or damages" (*Kraycar v Monahan*, 49 AD3d 507 [2d Dept 2008][internal citations omitted]). The claim for punitive damages was a "new" claim and Plaintiff's attempt to add same via a supplemental bill of particulars without leave of court was inappropriate.

As to the merits of such a claim, an award of punitive damages must be based upon a moral culpability manifested by spite or malice, fraudulent or evil motive, or a conscious and wilful or wanton disregard of the well-being of others (*see Borst v Lower Manhattan Dev. Corp.*, 162 AD3d 581 [1st Dept 2018]; *M.H. v Bed Bath & Beyond Inc.*, 156 AD3d 33 [1st Dept 2017]). It has been held that conduct justifying an award of punitive damages is "'intentional and deliberate, and has the character of outrage frequently associated with crime.'" (*Prozeralik v. Capital Cities Commercial Communications*, 82 NY2d 466, 479 [1993], *quoting* Prosser and Keeton, Torts § 2, at 9 [5th ed 1984]). Ordinary negligence cannot sustain a claim for punitive damages (*see Munoz v Puretz*, 301 AD2d 382 [1st Dept 2003]).

Defendants established that its conduct, even when viewed in a light most favorable to Plaintiff and considering that issues of fact as to their negligence have been found, does not reach this threshold (*see Munoz v Puretz*, 301 AD2d 382 [1st Dept 2003]; *Dawson v YMCA of*

Long Is., Inc., 120 AD3d 748 [2d Dept 2014]). Although the injuries sustained by Decedent were severe and resulted in his death, there is not "anything unusual or extraordinary about Defendants' conduct to warrant punitive damages" (*Gonzalez v 231 Ocean Assoc.*, 131 AD3d 871, 872 [1st Dept 2015]).

Limitation of Liability to Proportionate Share of Fault - CPLR §1601

At common-law, a joint tortfeasor who is found even one percent at fault can be compelled to pay the entire amount of Plaintiff's damages award (*see Rangolan v County of Nassau*, 96 NY2d 42, 46 [2001]). To remedy a perceived inequity to low-fault, deep pocketed defendants, the legislature enacted CPLR §1601[1] (*see Artibee v Home Place Corp.*, 28 NY3d 739, 750 [2017]). That section provides, in pertinent part, that:

> when a verdict or decision in an action or claim for personal injury is determined in favor of a claimant in an action involving two or more tortfeasors jointly liable or in a claim against the state and the liability of a defendant is found to be fifty percent or less of the total liability assigned to all persons liable, the liability of such defendant to the claimant for non-economic loss shall not exceed that defendant's equitable share determined in accordance with the relative culpability of each person causing or contributing to the total liability for non-economic loss

Defendants move for partial summary judgment "limiting the jury's apportionment of fault against the Gault Defendants, if any, to 50% or less, thereby entitling the Gault Defendants to the protections of CPLR § 1601's limitations on joint and several liability". Section 1601 is clear that apportionment is conducted after "a verdict or decision in an action or claim for personal injury is determined in favor of a claimant". In other words, the question of "apportionment of fault [is] for the fact finder" (*see Rhoden v Montalbo*, 127 AD2d 645, 646 [2d Dept 1987]). Although instances of court intervention in the apportionment process exist, they are limited to post-trial assessment of whether a jury's apportionment was based upon a fair interpretation of the evidence (*see eg Hernandez v Pappco Holding Co., Ltd.*, 136 AD3d 981 [2d Dept 2016]; *Dockery v Sprecher*, 68 AD3d 1043 [2d Dept 2009]; *Cintron v New York City Tr. Auth.*, 22 AD3d 248 [1st Dept 2005]). Defendants cite no authority, and this Court could also discern none, that permits a court to prophylactically limit a jury's assessment of comparative fault before trial.

PLAINTIFF'S CROSS-MOTION

Spoliation Sanctions

"Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126" (*Parauda v Encompass Ins. Co. of America*, 188 AD3d 1083, 1085 [2d Dept 2020]; *Holland v W.M. Realty Mgt., Inc.*, 64 AD3d 627, 629 [2d Dept 2009]). "Supreme Court has broad discretion to determine a sanction for spoliation of evidence" (*Rossi v Doka USA, Ltd.*, 181 AD3d 523, 526 [1st Dept 2020]).

"A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" (*Luzuriaga v FDR Services Corp.*, 189 AD3d 817 [2d Dept 2020] *quoting Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015] [internal quotation marks omitted]). "Where the evidence is determined to have been intentionally or wilfully destroyed, the relevancy of the destroyed [evidence] is presumed. On the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed [evidence was] relevant to the party's claim or defense" (*Delmur, Inc. v School Construction Authority*, 174 AD3d 784, 787 [2d Dept 2019] *quoting Pegasus Aviation I, Inc. v Varig Logistica S.A.*, supra at 547–548). "'Recognizing that striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct, Courts will consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness'" (*Jennings v Orange Regional Med. Ctr.*, 102 AD3d 654, 655–656 [2d Dept 2013] *quoting Iannucci v Rose,* 8 AD3d 437, 438 [2d Dept 2004]). "[A] less severe sanction or no sanction is appropriate where the missing evidence does not deprive the moving party of the ability to establish his or her case" (*Denoyelles v Gallagher,* 40 AD3d 1027 [2d Dept 2007]).

Here, the building at issue was clearly key evidence and there was a likelihood of litigation based upon the fire and associated death of Decedent. However, Plaintiff failed to demonstrate that "demolition of [the building] . . . pursuant to mandate of the Department of Buildings was an intentional attempt to hide or destroy evidence or a negligent destruction of evidence that [Defendants] had a duty to preserve" (*Weiss v Indus. Enters.*, 7 AD3d 518 [2d Dept 2004]; *see also Gagliardi v Preferred Mut. Ins. Co.*, 102 AD3d 741 [2d Dept 2013]; *cf. Spoiled Trucks & Cars Corp. v C&N Realty Dev. LLC,* ____Misc3d____, 2011 NY Slip Op 33291[U][Sup Ct Queens Cty 2011]). Moreover, the record does not show that Plaintiff has been left prejudicially bereft of the ability to prosecute this action as Plaintiff can still rely on the witnesss testimony (*see Jennings v Orange Regional Med. Ctr.*, supra at 656; *see also Hirschberg v Winthrop–University Hosp.,* 175 AD3d 556, 557 [2d Dept 2019]). Plaintiff can also rely on the non-partisan and extensive fire investigation record of the FDNY and the lengthy deposition testimony of the primary investigating fire marshal.

Accordingly, it is

ORDERED that the branch of Defendant 324 E 94 and Gault's motion for summary judgment dismissing Plaintiff's complaint is denied as to Plaintiff's common-law negligence and wrongful death claims based upon the functioning of the self-closing door to apartment 1W and the specific attendant statute and code sections, otherwise all other bases of liability are dismissed, and it is

ORDERED that the branch of Defendant 324 E 94 and Gault's motion to dismiss Plaintiff's claim for punitive damages is granted, and it is

ORDERED that the branch of Defendant 324 E 94 and Gault's motion for partial summary judgment "limiting the jury's apportionment of fault against the Gault Defendants, if any, to 50% or less, thereby entitling the Gault Defendants to the protections of CPLR § 1601's limitations on joint and several liability" is denied, and it is

ORDERED that Plaintiff's cross-motion for summary judgment is denied.

4/12/2022
DATE

FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION		
	☐ GRANTED	☐ DENIED	☒ GRANTED IN PART	☐ OTHER	
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE	