At an IAS Term, Part 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 7th day of March, 2024.

P R E S E N T:

HON. JOY F. CAMPANELLI,
Justice.

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ARTHUR PURVIS, AARON SCATURO, KATHERINE CAROTHERS, JOSH STEINBAUER, SHADRACK LINDO, PETER PEARSON, TOSHIO MASUDA, TRAVIS MCDEMUS and BRYCE HACKFORD,

Plaintiffs,

- against - Index No. 17483/14

FJH REALTY INC.,

Defendant.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations)	64-73
Opposing Affidavits (Affirmations)	198, 200-235
Reply Affidavits (Affirmations)	267-275

Upon the foregoing papers in this action by three residential tenants and five subtenants of the six-story former factory at 79 Lorimar Street in Brooklyn (Building), against FJH Realty Inc., the Owner/Landlord of the Building (FJH, Owner/Landlord or Defendant), for noncompliance with Article 7-C of the Multiple Dwelling Law (MDL), §§ 280, et seq. (the Loft Law), defendant FJH moves (in motion sequence [mot. seq.] five) for an order, pursuant to CPLR 3211 (a) (1), (a) (3) and (a) (7) and 3212, dismissing the second

amended complaint, granting it summary judgment on its first counterclaim for reasonable attorneys' fees and, upon the grant of same, setting this matter down for a hearing to determine the amount to be awarded.

Background

The Vacate Order

On November 7, 2014, the New York City Department of Buildings (DOB) issued an order directing that the Building be vacated from residential occupants (Vacate Order) because the Building, a former factory, lacked a residential certificate of occupancy and had outstanding DOB violations issued against it.

This 2014 Action

Soon thereafter, on December 18, 2014, three long-time tenants of the Building, Arthur Purvis (Purvis), Aaron Scaturo (Scaturo) and Shafrack Lindo (Lindo) (collectively, Tenant Plaintiffs), and six subtenants of the Building, Katherine Carothers, Josh Steinbauer, Peter Pearson, Toshio Masuda, Travis McDemus and Bryce Hackford (collectively, Subtenant Plaintiffs) commenced this action against FJH, the Owner/ Landlord of the Building, the DOB and Rick D. Chandler. Essentially, Plaintiffs sought a declaration that the Building, and consequently their tenancies, are subject to the Loft Law and an award of money damages based on FJH's failure to legalize the Building for residential use. An amended complaint was filed in March 2015.

Plaintiffs' Joint Loft Law Application

On August 4, 2015, during the pendency of this action, Plaintiffs filed a joint application with the New York City Loft Board seeking Loft Law coverage and protection for themselves and their respective units in the Building. By an October 15, 2015 stipulation, this action was stayed on consent pending a final determination of Plaintiffs' Loft Law application and the exhaustion of all appeals (NYSCEF Doc No. 2).

Loft Board Order No. 4688

On September 21, 2017, after a full trial, the Loft Board issued Loft Board Order No. 4688 (LBO 4688) determining that the Building is an interim multiple dwelling (IMD) subject to coverage under the Loft Law, but the Loft Board only granted protected status to Tenant Plaintiffs Purvis, Scaturo and Lindo and not to the Subtenant Plaintiffs (*see* NYSCEF Doc No. 72). Notably, LBO 4688 explicitly provides, in part, that:

> "[i]n Owner's Post Trial-Memorandum of Law, dated December 2, 2016, Owner . . . *conceded* that the Units were residentially occupied for twelve (12) consecutive months, between January 1, 2008 and December 31, 2009 ('Window Period'), and that prime lessees Scaturro, Lindo and Purvis resided, primarily, in the Units" (*id.* at 1 [emphasis added]).

Thus, there is no factual dispute that the Tenant Plaintiffs were residents at the Building during the current Window Period of qualification under the Loft Law.

On or about April 19, 2018, the Vacate Order was rescinded.

The Second Amended Complaint

On November 5, 2020, this action was restored to the court's calendar on consent. On November 30, 2020, Plaintiffs filed a second amended verified complaint against FJH alleging the following regarding the nature of this action:

> "This is an action brought by a group of aggrieved residential tenants of an illegal former factory building seeking protection under Article 7-C of the Multiple Dwelling Law, §§ 280, et seq. ('the Loft Law'). These tenants have, with the owner's knowledge and consent, improved and long resided in the Subject Building . . . under the guise of 'commercial' leases that were issued by the owner/landlord. The owner/landlord, Defendant FJH . . . has at all times been aware of the residential use of the Building, though it lacks a certificate of occupancy permitting residential use. As a result of such circumstances, *the Building qualifies for protection and coverage under the Loft Law*, which supplies a mandate and means for legalization, and protects the residential occupants from eviction during such process. On September 21, 2017, in a separate proceeding before the New York City Loft Board (the 'Loft Board'), the Loft Board issued an order . . . granting the Building and Premises Loft Law coverage and protected occupant status for three of the Plaintiffs, Arthur Purvis, Aaron Scaturro and Shadrack Lindo" (NYSCEF Doc No. 5 at ¶ 1 [emphasis added]).

The second amended complaint alleges that "[t]here has never been any certificate of occupancy issued by the DOB for the Subject Building . . ." and "[t]he Subject Building lacks a certificate of occupancy permitting residential use thereof" (*id.* at ¶¶ 31-32).

The second amended complaint asserts the following five causes of action against FJH for: (1) a mandatory injunction requiring FJH to perform the work necessary to obtain a residential certificate of occupancy for the Building, pursuant to MDL §§ 284 and 301

(*id.* at ¶¶ 98-104); (2) money damages, pursuant to MDL § 284 (1) (x), for the fair market value of improvements that Plaintiffs made to their units and relocation expenses incurred during the Vacate Order (*id.* at ¶¶ 106-107); (3) money damages for breach of the implied warranty of habitability based on FJH's failure to do the work necessary to obtain a residential certificate of occupancy (*id.* at ¶¶ 109-115); (4) money damages for gross negligence based on FJH's alleged failure to maintain and safeguard the Building during the Vacate Order (*id.* at ¶¶ 117-123); and (5) money damages for trespass and intentional interference with Plaintiffs' personal property (*id.* at ¶¶ 125-130).

On January 15, 2021, FJH answered the second amended complaint, denied the material allegations therein, asserted affirmative defenses, including that FJH's alleged acts and the execution of the Tenant Plaintiffs' commercial leases occurred prior to the 2015 amendment of the Loft Law by which the Window Period was extended (NYSCEF Doc No. 7 at ¶¶ 137-140), and asserted a counterclaim against the Tenant Plaintiffs for an award of legal fees in accordance with the terms of their commercial leases (*id.* at ¶¶ 149-150).

FJH's Instant Summary Judgment Motion

On June 21, 2023, FJH moved for summary judgment dismissing the second amended complaint and granting its first counterclaim against the Tenant Plaintiffs Purvis, Scaturo and Lindo for an award of reasonable attorneys' fees.

FJH submits an affirmation from Barry Hoffman (Hoffman), FJH's manager, who affirms that all claims asserted against FJH are based on its alleged violation of the Loft Law and "because the accrual of Plaintiffs' claims predate the Building's eligibility and

coverage under the Loft Law when the Owner had no such obligation(s), Plaintiffs' claims are expressly barred . . ." (NYSCEF Doc No. 66 at ¶ 5). FJH argues that Tenants' claims are based on commercial leases executed on June 1, 2002 (Purvis lease, NYSCEF Doc No. 69), October 1, 2007 (Scaturo lease, NYSCEF Doc No. 70) and July 1, 2005 (Lindo lease, NYSCEF Doc No. 71), all of which predate the Building's eligibility under the Loft Law's June 15, 2015 amendments (NYSCEF Doc No. 66 at ¶¶ 5 and 19). Hoffman also asserts that "Plaintiffs' claims, insofar as they arose and/or accrued prior to the date on which Loft Law coverage was granted [by the Loft Board on September 21, 2017], including as a result of the [November 7, 2014] Vacate Order, must be governed by the Leases and law applicable to commercial premises" (*id.* at ¶ 19).

Alternatively, Hoffman asserts that "[e]ven if Plaintiffs' claims are viable, they should be heard by the New York City Loft Board . . ." which "has primary jurisdiction over such issues" affecting an IMD and should appropriately decide them (*id.* at ¶¶ 5 and 20; *see also* NYSCEF Doc No. 65 at ¶ 6).

Hoffman argues that FJH is entitled to recover reasonable attorneys' fees from Plaintiffs Purvis, Scaturro and Lindo, jointly and severally, under the terms of their commercial leases (NYSCEF Doc No. 66 at ¶¶ 6 and 10).[1] He contends that the other plaintiffs (Carothers, Steinbauer, Pearson, Masuda, McDemus and Hackford), who are

[1] Paragraph 16 (d) of the Rider to the Tenant Plaintiffs' respective commercial leases each provide that tenant agrees to pay landlord's legal fees as additional rent "in any action or proceeding whatsoever involving or affecting landlord, tenant or this lease . . ." (*see* NYSCEF Doc Nos. 69, 70 and 71 at Rider ¶ 16 [d]).

"roommates and/or subtenants" "lack standing to maintain this action against the Owner because they lack privity and as such, their claims . . . should be dismissed" (NYSCEF Doc No. 66 at ¶¶ 7 and 11). Hoffman asserts that FJH "has no relationship with Subtenants whatsoever and has no personal knowledge of how and/or when Subtenants entered into possession" (*id.* at ¶ 12).

FJH submits an attorney affirmation in which defense counsel challenges the legal sufficiency of the five claims asserted against FJH in the second amended complaint (NYSCEF Doc No. 65). Counsel asserts that the first cause of action, by which Plaintiffs seek a mandatory injunction compelling FJH to perform work necessary to obtain a residential certificate of occupancy for the Building pursuant to the Loft Law is subject to dismissal for failure to satisfy conditions precedent. Defense counsel explains that the Loft Board regulations, including MDL § 284, explicitly require an administrative hearing before the Loft Board and a determination that FJH violated the legalization requirements under the Loft Law as a condition precedent to the injunctive relief that Plaintiffs now seek (*id.* at ¶¶ 27 and 29-33).

In addition, defense counsel argues that the Loft Board has primary jurisdiction over the legalization of IMDs and should more appropriately decide the issues raised in Plaintiffs' second amended complaint (*id.* at ¶¶ 38-41). Counsel contends that the second amended complaint does not allege entitlement to injunctive relief because there are no allegations of irreparable harm and Plaintiffs have an adequate remedy at law, since they are simultaneously seeking monetary damages on their other claims (*id.* at ¶¶ 43-44).

Regarding the second cause of action for money damages, pursuant to MDL § 284 (1) (x), for the fair market value of improvements that Plaintiffs made to their units and relocation expenses, defense counsel asserts that "MDL § 284 does not provide for recovery of money damages based solely on issuance of the Vacate Order, *but only if the issuance of the Vacate Order resulted from the Owner's unlawful failure to comply with the legalization requirements* thereof" (*id.* at ¶ 47 [emphasis added]). Defense counsel reasons that:

> "It is undisputed that the Vacate Order was issued by DOB on November 7, 2014. . .
>
> "It is also undisputed that the Building was not subject to the Loft Law, and consequently the legalization requirements of MDL § 284, until September 21, 2017 upon the issuance of LBO 4688 finding that the Building was an IMD. . . .
>
> "At the time the Vacate Order was issued, the Building was not subject to and could not qualify for coverage under the Loft Law because the deadline to apply for same expired on March 11, 2014 and was not reopened again until June 15, 2015. . .
>
> "Because the Building and the Owner were not and could not be subject to the requirements of MDL § 284 when the Vacate Order was issued, Plaintiffs' 'forced' . . . vacatur pursuant to the same was not and could not have been a consequence of the Owner's unlawful failure to comply with the legalization requirements under the Loft Law. . ." (*id.* at ¶¶ 48-50).

Defense counsel argues that the third cause of action for breach of the warranty of habitability is subject to dismissal because "the Units were commercial in nature and as such, [were] not subject to the warranty of habitability until [they] w[ere] covered under the Loft Law" when the Loft Board issued LBO 4688 on September 21, 2017 (*id.* at ¶¶ 54

and 56). Defense counsel further contends that FJH "did not actually or constructively evict Plaintiffs since Tenants assumed the obligation to repair and maintain their Units,[2] including lifting of the Vacate Order and cur[ing] the underlying violations, pursuant to their Leases"[3] (*id.* at ¶¶ 54 and 59).

Regarding the fourth cause of action for gross negligence based on FJH's alleged failure to maintain the Building during the Vacate Order, defense counsel asserts that "[a]bsent an independent statutory obligation, the parties' obligations are governed by Tenants' respective leases" and under the Tenant Plaintiffs' commercial leases, FJH "never retained any obligation to maintain and/or make repairs" (*id.* at ¶¶ 83-84). Defense counsel notes that the leases expressly state that Plaintiffs took possession of the premises "as is," assumed all obligations to maintain and repair the premises and FJH assumed no responsibility for Tenants' personal property (*id.* at ¶ 85; *see also* NYSCEF Doc Nos. 69-71, Leases at ¶ 19, Riders at ¶¶ 3, 4 and 6 [c]).

Defense counsel also notes that the second amended complaint fails to allege the necessary elements for a gross negligence claim, including when the alleged misconduct

[2] *See* NYSCEF Doc Nos. 69-71, the Tenant Plaintiffs' commercial leases at ¶ 2 (providing that "throughout said term the Tenant will take good care of the demised premises, fixtures and appurtenances, and all alterations, additions and improvements to either; make all repairs in and about the same necessary to preserve them in good order and condition . . .").

[3] *See* NYSCEF Doc Nos. 69-71, Plaintiffs' commercial leases at Rider ¶ 14 (providing that "[i]f any violation[s] is [are] assessed or a summons of action instituted or taken by New York City or any governmental agency as a result of premises and their use not complying with the applicable regulations, tenant shall legalize the premises or immediately satisfy any action or proceeding or violation at its own cost, except that so long as tenant uses the premises in accordance with the use clause herein, Tenant should not be responsible for certificate of occupancy violation, if any, and any pre-existing violation").

occurred or the factual circumstances, "[n]or did Plaintiffs allege any facts demonstrating a duty imposed upon the Owner, breach of said duty, causation, and damages to sustain a cause of action for negligence" (NYSCEF Doc No. 65 at ¶ 88).

Defense counsel argues that the fifth cause of action for trespass and intentional interference with Plaintiffs' personal property is subject to dismissal because FJH reserved its right to unfettered access to the units in paragraph 18 of Tenants' leases (*id.* at ¶ 93). Defense counsel also notes that the second amended complaint contains no factual allegations to support a trespass claim, including the misconduct complained of or the personal property allegedly damaged (*id.* at ¶ 94).

Finally, defense counsel argues that FJH is entitled to summary judgment on its counterclaim for an award of attorneys' fees from the Tenant Plaintiffs Purvis, Scaturo and Lindo, pursuant to the express terms of Paragraph 16 of the Rider to their respective commercial leases (*id.* at ¶ 98).

Plaintiffs' Opposition

Plaintiffs, in opposition, submit a memorandum of law asserting that FJH's "theory" that "Defendant held no duty to Plaintiffs prior to when the Loft Board issued LBO 4688 confirming [that] the Building and Plaintiffs were covered by the Loft Law" is "flawed" because FJH's "duties to Plaintiffs arise both by virtue of the Loft Law and by Defendant's knowledge of, acquiescence to, and encouragement of Plaintiffs' residential use" (NYSCEF Doc No. 199 at 4).

Without citing any legal authority, Plaintiffs argue that "[e]ven where a commercial lease of an IMD tenant says otherwise, the tenant is entitled to protections like the warranty of habitability . . ." (*id.*). Plaintiffs assert that "[w]here owners have knowledge of and condoned tenants 'illegal' residential use, they are estopped from denying tenants associated rights" and "[h]ere, ample evidence exists that Defendant knew, condoned and encouraged Plaintiffs' residential use from the inception of their tenancies as early 2002" (*id.* at 5).

The Tenant Plaintiffs submit affidavits to establish that FJH "issued commercial leases for each of Plaintiffs' apartments *but always knew of and intended for the Units to be used residentially*" (*id.* at 5 [emphasis added]). The Purvis affidavit thus asserts that:

> "On April 23, 2002, as a condition of receiving a month's rent as deposit, the landlord's representative Ephraim Rosinger and I signed a contract explicitly guaranteeing that in 'the apartment,' Owner would install 'a clean, newly installed kitchen and clean, newly tiled bathroom, with new sinks (one in bathroom, one in kitchen), a toilet, a shower, a bathtub, a refrigerator, a range, and working plumbing and gas (if it's a gas range)' prior to my taking of possession. . . .
>
> "It was furthermore guaranteed to me that the unit was at that time zoned for simultaneous residential and commercial use.
>
> "Ephraim Rosinger also represented to me at that time that he was not truly a 3rd party real estate broker and in fact was a familial relation of the owner Jacob Hoffman" (NYSCEF Doc No. 200 at ¶¶ 5-7).

Purvis attests that subsequently, on May 24, 2002, he executed the lease with Hoffman, at which time he explicitly advised Hoffman that he intended to build bedrooms in the space

(*id.* at ¶¶ 8-9). According to Purvis, "Jacob Hoffman informed [him] that this was an acceptable plan but that he would like to view any construction we did in the unit after it was completed" (*id.* at ¶ 9). Purvis attests that "[a]side from the initial post-construction inspection, Barry Hoffman entered my unit and observed the fact that it was used residentially on multiple occasions" (*id.* at ¶ 18). Purvis further attests that "[w]hen D[OB] inspectors started to show up regularly at the building in the fall of 2014 . . ." Hoffman "advised me to never open the door to any DOB inspectors so that they could not observe that the units were residentially occupied" (*id.* at ¶ 32). Purvis also attests that:

> "In August, 2015, myself and Plaintiffs Scaturo and Lindo filed an application for coverage and protected occupancy for our units. In the hearing associated with that application, Defendant stipulated to the fact that 'each of [our] units were residentially converted and occupied for twelve consecutive months during the January 1, 2008 and December 31, 2009 window period pursuant to MDL § 281 (5)' (*id.* at ¶ 35).

Scaturo submits an affidavit similarly asserting that "it would be impossible for me to believe that Defendant did not know about the residential nature of my unit" because Hoffman and the Building's superintendent, Mike White, were in his unit many times (NYSCEF Doc No. 202 at ¶¶ 11 and 15). Lindo also asserts in his affidavit that:

> "As Defendant's office was just across the hall from my unit, I frequently saw Jimmy Hoffman in and around the Building. I also paid rent in-person at my landlord's office, crossing the hall from my Unit to drop it off. It would have been impossible for any managing member of Defendant to not have known that I was their residential tenant" (NYSCEF Doc No. 201 at ¶ 9).

Subtenant Plaintiffs Steinbauer, Pearson, McDemus and Hackford submit affidavits attesting that they do not lack "privity" with FJH because they directly paid Hoffman rent checks (NYSCEF Doc Nos. 206 at ¶ 6; 205 at ¶ 6; 204 at ¶ 7; 203 at ¶ 7).

In support of their fifth case of action for trespass, Plaintiffs submit an affidavit from Brad Isnard (Isnard), a non-party, former subtenant of Purvis at the Building, who attests that on January 20, 2015, "I witnessed Owner FJH Realty's superintendent, Mike White . . . illegally enter into the Building with the intention to take the valuable items of the people who lived there, including myself" (NYSCEF Doc No. 207 at ¶ 3).

FJH's Reply

FJH, in reply, submits an attorney affirmation asserting that there is no authority for application of the Loft Law "retroactively" to the Building prior to the Loft Board's determination of coverage thereunder in September 2017, and "[b]ecause all of the events relating to Plaintiffs' claims predate coverage under the Loft Law, the Leases between the parties must control" (NYSCEF Doc No. 267 at ¶¶ 15 and 19). Defense counsel notes that "Plaintiffs fail to cite to any authority that imposes any such obligations upon the Owner prior to the Loft Board's determination, when the Building was determined for the first time to be an IMD" (*id.* at ¶ 16). Counsel asserts that "Plaintiffs' claim is further belied by judicial and Loft Board precedent, which have repeatedly found that coverage under the Loft Law is not 'automatically affixed'" (*id.* at ¶ 18). In response to Plaintiffs' argument that FJH knew the Building was Plaintiffs' residence, counsel asserts that "Plaintiffs fail to

cite to any authority pursuant to which such alleged knowledge and/or acquiescence imposes any obligations and/or liability upon the Owner retroactively" (*id.* at ¶ 44).

Defense counsel argues that the fifth cause of action for trespass and intentional interference with Plaintiffs' personal property cannot be asserted against FJH based on the superintendent's intentional tort committed outside the scope of his employment by FJH (*id.* at ¶¶ 55-56).

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant has made a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

The Subtenant Plaintiffs

As a preliminary matter, the Subtenant Plaintiffs, whose joint application for protection under the Loft Laws *was denied by the Loft Board* in September 2017, lack standing to seek the relief sought in the second amended complaint. Unlike the Tenant Plaintiffs, the Subtenant Plaintiffs and FJH never entered into commercial leases, and thus, they lack privity with FJH. Further, there is no evidence that FJH specifically authorized their subtenancies or undertook any duty to the Subtenant Plaintiffs. Without Loft Law protection or privity, the Subtenant Plaintiffs' claims are dismissed for lack of standing.

The First Cause of Action

The first cause of action seeks a mandatory injunction requiring FJH to perform the work necessary to obtain a residential certificate of occupancy for the Building, pursuant to MDL §§ 284 and 301. However, the Loft Board's Regulations which govern a landlord's legalization obligations pursuant to MDL § 284 (1) state, in relevant part:

> "If *the Loft Board finds an owner in violation* of the code compliance timetable set forth in MDL § 284 (1) and 29 RCNY § 2-01 (a), the Loft Board or any *three occupants* of separate, covered residential units in the building *may apply to a court of competent jurisdiction for an order of specific performance* directing the owner to satisfy all code compliance requirements set forth in this section" (29 RCNY § 2-01 [c] [4] [emphasis added]).

Thus, according to the plain language of the Loft Board Regulation, such injunctive relief is premature until after the Loft Board finds that FJH is in violation of the MDL compliance requirements. To date, there has been no such finding by the Loft Board. The Loft Board's

Regulations further provide procedures for evaluating compliance through enforcement proceedings and hearings by the Loft Board *before* residential tenants may seek injunctive relief in court:

> "Enforcement Proceedings. At any point prior to the issuance of the final residential certificate of occupancy issued pursuant to MDL § 301, the Loft Board may initiate an enforcement proceeding against an Owner or Responsible Party for failure to take all reasonable and necessary action to obtain a final residential certificate of occupancy. . .
>
> Hearings. Hearings will be conducted by OATH Administrative Law Judges or ECB hearing officers, who will determine whether the Owner or Responsible Party has made a diligent, consistent and good faith effort to obtain a residential certificate of occupancy for the IMD as required by Art. 7-C of the MDL . . ." (29 RCNY § 2-01.1 [b]).

29 RCNY § 2-01.1 (a) (1) (i) sets forth the factors to be considered at a hearing "[i]n deciding whether an Owner or Responsible Party has been taking all reasonable and necessary actions to obtain a certificate of occupancy" pursuant to MDL §284 (1).

Consequently, the Tenant Plaintiffs' application for a mandatory injunction requiring FJH to do the work necessary to obtain a residential certificate of occupancy for the Building is dismissed as premature because the Loft Board has yet to find that FJH violated the Loft Law through enforcement proceedings and administrative hearings, all of which are conditions precedent to the injunctive relief Plaintiffs seek.

The Second Cause of Action

By the second cause of action, Plaintiffs seek money damages, pursuant to MDL § 284 (1) (x), for the fair market value of improvements that they made to their units and for relocation expenses that they incurred during the Vacate Order.

"Section 284 of the MDL requires the owner of a interim multiple dwelling to, *inter alia*, file an alteration application; take all action reasonable and necessary to obtain an approved alteration permit; comply with residential fire and safety codes and 'take all reasonable and necessary action' to obtain an appropriate certificate of occupancy" (*37 W. Realty Co. v Horacio F. Salinas Photography Co.*, 16 Misc 3d 1122 [A] [Sup Ct New York County 2007]). However, it is unclear that FJH can be held liable for violating MDL § 284 if: (1) the execution of the Tenant Plaintiffs' commercial leases occurred prior to the 2015 amendment of the Loft Law by which the Window Period was extended, and (2) the Building was not determined to be an IMD by the Loft Board until September 2017. To date, there has been no finding by the Loft Board that FJH violated any provision of the MDL to warrant an award of damages to the Tenant Plaintiffs for their relocation expenses due to the Vacate Order.

Regarding the cost of alterations, the Court of Appeals has held that:

> "[t]he Loft Law provides a detailed process for converting commercial space that had been unlawfully occupied as a residence to lawful residential use. *Section 286 of that law provides a mechanism for tenants to recoup costs of improvements and for landlords to purchase tenants' improvements* and rights. Upon doing so, landlords obtain relief from rent regulation under the Loft Law. However,

> occupancy of the unit is still governed by the Loft Law and the unit remains subject to all the relevant compliance provisions and deadlines. . . .” (*Aurora Assocs. LLC v Locatelli*, 38 NY3d 112, 124-125 [2022] [emphasis added]).

Like the first cause of action, the second cause of action by which the Tenant Plaintiffs seek to recoup the costs of alterations and damages incurred as a direct result of the Vacate Order should be sought before the Loft Board, pursuant to MDL §§ 284 and 286.

The Third Cause of Action

“Pursuant to Real Property Law [RPL] § 235-b, *every residential lease* contains an implied warranty of habitability which ‘protects only against conditions that materially affect the health and safety of tenants or deficiencies that ‘in the eyes of a reasonable person . . . deprive the tenant of those essential functions which a residence is expected to provide’” (*Witherbee Court Assocs. v Greene*, 7 AD3d 699, 701 [2004] [quoting *Solow v Wellner*, 86 NY2d 582, 588 (1995)] [emphasis added]). The Second Department has held that there is no such warranty of habitability implied in commercial leases, like those governing Purvis’, Scaturo’s and Lindo’s tenancies, as a matter of law (*see Disunno v WRH Properties, LLC*, 97 AD3d 780, 781 [2012] [holding that the implied warranty of habitability applies only to residential leases]).

Here, there is no dispute that the Tenant Plaintiffs’ Leases are *commercial* leases and *not residential* leases, and therefore, the third cause of action asserted by Plaintiffs Purvis, Scaturo and Lindo against FJH for breach of the implied warranty of habitability is dismissed, as a matter of law.

The Fourth Cause of Action

The fourth cause of action seeks money damages for gross negligence based on FJH's alleged failure to maintain and safeguard the Building during the Vacate Order. However, the relationship between the Tenant Plaintiffs and FJH are governed by the parties' commercial leases, all of which provide, in relevant part, that Landlord:

> "shall be permitted at any time during the term to visit and examine [the units] at any reasonable hour . . . to make or facilitate repairs in any part of the building . . . it is, however, expressly understood that the right and authority hereby reserved, does not impose, nor does the Landlord assume, by reason thereof, *any responsibility or liability whatsoever for the care or supervision of said premises*" (NYSCEF Doc Nos. 69-71 at ¶ 18 [emphasis added]).

Other than the rights and obligations set forth in those leases, the second amended complaint fails to allege that FJH owes the Tenant Plaintiffs an independent duty to maintain and safeguard the Building, which is a necessary element of a negligence claim. Consequently, the fourth cause of action for gross negligence is subject to dismissal.

The Fifth Cause of Action

The fifth cause of action seeks money damages against FJH for trespass and intentional interference with Plaintiffs' personal property. Isnard, a former subtenant of Purvis and a non-party, attests in his affidavit that on January 20, 2015, he witnessed the Building's superintendent, Mike White, and another man break into the Building *with the intention* of stealing Plaintiffs' personal property (NYSCEF Doc No. 207 at ¶ 3). However, Isnard further attests that Mike White told him that "he was just checking that no one was

in the Building" and when the police arrived, "Mr. White told the officers . . . that he was at the Building to check for frozen pipes and gas heaters and people living there" (*id.* at ¶¶ 7 and 9). Given the Vacate Order in place at that time, White's explanation for being in the Building is plausible and raises a factual question as to whether he was in the Building within the scope of his employment by FJH as superintendent.

It is well established that "[a]n employer is liable, under the doctrine of respondeat superior, for a tort committed by his servant while acting within the scope of his employment" (*Young Bai Choi v D & D Novelties, Inc.*, 157 AD2d 777, 778 [1990]). The Second Department has held that "[t]he determination of whether a particular act was within the scope of a servant's employment is so heavily dependent on factual considerations that the question is ordinarily one for the jury" (*Patterson v Khan*, 240 AD2d 644, 644 [1997]).

Here, there are factual questions that preclude summary judgment as to whether Mike White legally entered the Building on FJH's behalf and within the scope of his employment as superintendent on January 20, 2015, to check the pipes, gas heaters and that nobody was in the Building during the Vacate Order, or whether Mike White illegally broke into the Building on his own accord with the sole intention of stealing the Tenant Plaintiffs' personal property.

FJH's First Counterclaim

FJH seeks summary judgment on its counterclaim against the Tenant Plaintiffs for an award of reasonable legal fees in accordance with Paragraph 16 of their respective leases. Paragraph 16 of the Tenant Plaintiffs' leases provides that:

> "Tenant hereby agrees to pay, as additional rent . . . [a]ll reasonable attorney's fees and disbursements and all other court costs or expenses of legal proceedings which landlord may incur or pay out by reason of or connection with . . . (d) [a]ny other appearance by landlord . . . in any action or proceeding whatsoever involving or affecting landlord, tenant or this lease . . ." (NYSCEF Doc Nos. 69-71, Rider at ¶ 16).

Based on the plain and unambiguous language in the forgoing provision of the Tenant Plaintiffs' respective leases, *at the conclusion of this action*, FJH is entitled to an award of reasonable legal fees since this action both involves and affects FJH, the Tenant Plaintiffs and their respective commercial leases. At the conclusion of this case, this court will hold a hearing to determine the amount of such legal fees. Accordingly, it is hereby

ORDERED that FJH's summary judgment motion (mot. seq. five) is only granted to the extent that: (1) all claims asserted in the second amended complaint by the Subtenant Plaintiffs are dismissed for lack of standing; (2) the Tenant Plaintiffs' first cause of action for a mandatory injunction and their second cause of action for money damages under the MDL are hereby dismissed without prejudice, since such relief must be sought in an application before the Loft Board; (3) the third and the fourth causes of action are dismissed with prejudice, as a matter of law; and (4) FJH is granted summary judgment on its counterclaim for an award of reasonable legal defense fees, pursuant to Paragraph 16 of

the Tenant Plaintiffs' commercial leases, in an amount to be determined at the conclusion of this action; FJH's summary judgment motion is otherwise denied and the fifth cause of action asserted against FJH by the Tenant Plaintiffs for trespass is severed and shall proceed to trial.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.