SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS Part 11

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ANDREA TRUPPIN,

Index No.: 152316/16

Plaintiff,

-against-

CAMBRIDGE DEVELOPMENT, LLC, CAMBRIDGE AFFILIATES, LLC, ARIA SENIOR LIVING GROUP, INC., SENIOR QUARTERS MANAGEMENT CORP. d/b/a ATRIA 86th STREET a/k/a ATRIA RETIREMENT AND ASSISTED LIVING, and KAPSON SENIOR HEADQUARTERS,

Defendants.

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JOAN MADDEN, J.:

In this action arising out of a landlord tenant relationship, defendants move for an order (1) dismissing the complaint pursuant to CPLR 3211(a)(4) on the grounds that there is another action pending in this court seeking the same relief between the same parties, (2) dismissing the causes of action for breach of quiet enjoyment, constructive eviction, a declaratory judgment, injunctive relief and attorneys' fees for failure to state a cause of action, (3) dismissing the cause of action for negligence as duplicative of the cause of action of breach of the warranty of habitability, (4) dismissing all causes of action existing prior to December 8, 2011 on the grounds of res judicata, (5) dismissing all causes of action to the extent they are barred by the applicable statute of limitations, and (6) dismissing plaintiff's demand that the court "direct Defendants to make good faith efforts to cooperate with Verizon in an attempt to wire the building for high speed internet, TV and telephone access," or, in the alternative, staying the consideration of such demand pursuant to CPLR 2201, pending the outcome of an administrative proceeding between Verizon and defendant Cambridge Development, LLC ("Cambridge"). Plaintiff Andrea Truppin (Truppin) opposes the motion.

Background

Truppin is a rent regulated tenant of apartment 2002 ("the Apartment") at 33 West 86th Street, New York, NY ("the Building"). Defendants consist of the lessee of Building, the fee owner and other corporate entities that are affiliates of the lessee. In this action, Truppin alleges that there exist "dangerous, unhealthy and/or life-threatening conditions" in the Building including, *inter alia*, damaged and missing tile in her bathroom, a defective vent fan, which "creates loud and continuous noise and a noxious smell," legally insufficient hot water, the use of noxious chemicals in laundry room, defective window in son's bedroom, infestation with rodents and roaches, and a machine on the Building's roof which creates "low frequency throbbing noise." (Complaint ¶ 34). Based on these conditions, the complaint asserts causes of action for breach of the warranty of habitability, breach of the covenant of quiet enjoyment, constructive eviction, negligence, declaratory judgment, injunctive relief, and attorneys' fees based on Real Property Law § 234.[1]

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[1]RPL section 234 provides:

> Whenever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys' fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease, or that amounts paid by the landlord therefor shall be paid by the tenant as additional rent, there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease or in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease, and an agreement that such fees and expenses may be recovered as provided by law in an action commenced against the landlord or by way of counterclaim in any action or summary proceeding commenced by the landlord against the tenant. Any waiver of this

Truppin is also a plaintiff in a previously commenced putative class action against the defendants entitled Shultz v. Cambridge et al, Index No. 106632/2009, which asserts causes of action for nuisance, breach of the warranty of habitability and harassment under New York City's Administrative Code (hereinafter the "Prior Action"). The complaint in the Prior Action alleges, *inter alia*, that defendants attempted to induce plaintiffs to give up possession of their rent regulated apartments by, among other things, engaging "in a course of conduct designed to convert the Building, in whole or in part, into assisted living residences, an enhanced assisted living facility, adult care facility and/or nursing home" (Amended Verified Complaint, ¶ 24). It is further alleged that defendants failed to provide repairs and services, left common areas in an unsanitary condition, permitted elevators to become overcrowded, and allowed unsupervised workers in the Building and provided inadequate security.

Another Action Pending

Defendants argue that based on the existence of the Prior Action, this action must be dismissed. In support of their argument, defendants point out that a comparison of the amended complaint in the Prior Action and the complaint in this action reveals that whole sections relating to the alleged wrongs are identical, and that both the Prior Action and the instant one seek the same damages (i.e. for abatement of rent and damages for injury to property),assert causes of action for breach of the warranty of habitability, and include a laundry list of dangerous and unhealthy conditions such an inadequate repairs, vermin, and noxious fumes. Defendants also note that Truppin and defendants are parties in both actions, and that Truppin's attorney in this action is the attorney for Truppin and the other plaintiffs in the Prior Action.

Truppin opposes the motion, arguing that the conditions alleged in this action are unique

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section shall be void as against public policy.

to Truppin and therefore are not properly subject to the Prior Action, which is limited to "problems caused by [Cambridge's] unauthorized operation of a senior assisted living center."

"Pursuant to CPLR 3211(a)(4), a court has broad discretion as to the disposition of an action when another action is pending." Montalvo v. Air Dock Systems, 37 AD3d 567, 567 (2d Dept 2007). To warrant and dismissal under this provision, "the two actions must be sufficiently similar and the relief sought must be the same or substantially the same." Id. (internal quotations and citations omitted). There must also be at least a "substantial identity of parties 'which generally is present when at least one plaintiff and one defendant is common in each action.'" Proietto v. Donohue, 189 AD2d 807 (2d Dept 1993), citing Morgulus v. J. Yudell Realty, Inc., 161 AD2d 211, 213 (1st Dept 1990). Furthermore, the court need not dismiss the action but may make such order as justice requires, including consolidating the action with the earlier commenced action when the actions "involve common questions of law and fact." See Gutman v. Klein, 26 AD3d 464, 465 (2d Dept 2006); Wiltshire, 2A Carmody-Wait 2d, Another Action Pending § 12:2 (December 2016).

Here, the Prior Action and the instant one contain similar allegations and seek similar relief and there is a substantial identity of parties. At the same time, however, the instant action includes allegations and seeks relief unique to Truppin. Under these circumstances, and as the Prior Action and this action involve common issues of law and fact, in the exercise of its discretion, the court denies defendants' motion to dismiss on the ground of another action pending and directs that the two actions be consolidated for joint discovery and trial.

Failure to State a Cause of Action

Defendants next argue that the causes of action for breach of the covenant of quiet enjoyment, constructive eviction, a declaratory judgment, injunctive relief and attorneys' fees

should be dismissed for failure to state a cause of action.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the complaint must be liberally construed in a light most favorable to the plaintiff, and all factual allegations must be accepted as true. Goldman v. Metro. Life Ins. Co., 5 NY3d 561, 570-71 (2005). When a complaint "states a cause of action, and . . . from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law," defendant's motion to dismiss will be denied. Guggenheim v. Ginzburg, 43 NY2d 268, 275 (1977). However, a complaint that consists merely of "bare legal conclusions" or "factual allegations which fail to state a viable cause of action" will not withstand a motion to dismiss. See Leder v. Spiegel, 31 AD3d 266, 267 (1st Dept 2006), aff'd, 9 NY3d 836 (2007), cert denied, sub nom Spiegal v. Rowland, 552 US 1257 (2008).

With respect to the second cause of action for breach of the covenant of quiet enjoyment, to state such a cause of action, a plaintiff must allege: (i) constructive or actual eviction, and (ii) conduct by landlord that substantially and materially deprived the tenant of the beneficial use and enjoyment of the premises. Jackson v. Westminister House Owners Inc., 24 AD3d 249, 250 (1st Dept 2005), lv denied, 7 NY3d 704 (2006)(citation omitted). In particular, "[t]o make out a prima facie case of the breach of the covenant of quiet enjoyment . . . '[t]here must be an actual ouster, either total or partial, or if the eviction is constructive, there must have been an abandonment of the premises by the tenant.'" Bedke v. Chelsea Gardens Owners Corp., 27 Misc3d 1212(A) (Sup Ct NY Co 2010) (citation omitted); See also Barash v. PA Terminal Real Estate Corp., 26 NY2d 77, 83 (1970)("The tenant... must abandon possession in order to claim that there as a constructive eviction.")(citation omitted)); 74 NYJur2d Landlord and Tenant, § 296 (Nov. 2016).

Moreover, while "[a] constructive eviction does not require physical removal from the premises [it must be] demonstrate[d] that the lessee could not use the premises for the purpose(s) intended and had to abandon the premises under the circumstances." Herbert Paul, CPA. v. 370 Lex, L.L.C., 7 Misc3d 747, 750 (Sup Ct NY Co 2005) (citing Dinicu v. Groff Studios Corp., 257 A.D.2d 218, 224 (1st Dept 1999)). Thus, allegations of noise are only sufficient to state a claim for breach of the covenant of quiet enjoyment, when there are also allegations that the tenant has abandoned at least a portion of the apartment. See Yetnikoff v. Mascardo, 63 AD3d 473, 476 (1st Dept), lv denied, 13 NY3d 712 (2009); Bernard v. 345 East 73rd Owners Corp., 181 AD2d 543 (1st Dept 1992); Zamzok v. 650 Park Ave. Corp., 80 Misc2d 573 (Sup Ct NY Co. 1974). Here, as defendants argue, the complaint is devoid of allegations that Truppin abandoned the Apartment or any part of it as a result of the complained of conditions and/or the purported conduct of defendants. Accordingly, the second cause of action for breach of the covenant of quiet enjoyment fails to state a cause of action and must be dismissed.

For the same reason, the third cause of action for constructive eviction must be dismissed as this claim fails to allege that the conditions or wrongful acts of defendants caused plaintiff to abandoned the Apartment or a portion of the Apartment. See also Barash v. PA Terminal Real Estate Corp., 26 NY2d at 83; 74 NYJur2d Landlord and Tenant, § 294 (Nov. 2016).

The fourth cause of action, for negligence, alleges that defendants failed to exercise reasonable care in their duties as landlord and managing agents and, as a result, plaintiff suffered damages, including the reduced value of the Apartment and the damages to her personal property and costs associated with the protection of her property. Defendants seek to dismiss the claim solely on the ground that it is duplicative of Truppin's breach of warranty of habitability claim. As the two claims may be pleaded in the alternative, the motion to dismiss the negligence claim

is denied. See Goldstone v. Gracie Terrace Apt Corp, 73 AD3d 506, 507 (1st Dept 2010)(finding that the motion court properly denied summary judgment motion dismissing shareholder tenants claims against cooperative for, *inter alia*, breach of the warranty of habitability and negligence, where record raised issues of fact as to defendant's liability for "failing to make repairs in a timely manner").

The fifth cause of action (incorrectly denominated the fourth cause of action) seeks a declaratory judgment alleging that "[t]here currently exists a justiciable dispute between the parties as to whether defendants are required to permit plaintiff to perform repair work determined by this court to be necessary, [and that]...plaintiff has no adequate remedy at law" (Complaint, ¶'s 63, 64). Specifically, Truppin seeks (i) a declaration that Truppin is "entitled to full, unrestricted access to the subject premises for the purpose of performing the repair/renovation work [she] deems necessary, and to have the repair work performed by a licensed and insured contractor, of her choice, with expenses of the work to be borne by defendant;" (ii) "an order directing defendants to make good faith efforts to cooperate with Verizon in an attempt to wire the building for FIOS high speed internet, TV and telephone access;" (iii) "an order permitting plaintiff, through a licensed and bonded contractor to install a washer and dryer combination unit in the subject premises (as a result of chemicals allegedly being used in the laundry room)"; (iv) "an order directing defendants to hire a qualified engineer to (a) introduce an effective solution to stop cooking odors from entering plaintiff's apartment, (b) install an effective sound proofing around the grill fan on roof to prevent the sound of the fan from entering plaintiff's apartment;" and (v) "an order directing defendants to seek out the source of the second machine noise and introduce an effective solution so that the noise does not enter

plaintiff's apartment" (Id, ¶'s 65-69).

Defendants argue that the claim seeking declaratory relief should be dismissed as plaintiff has an adequate remedy at law in the form of damages based on her claim for breach of warranty of habitability. See Bartley v. Walentas, 78 AD2d 310 (1st Dept 1980)(finding that no declaratory relief was necessary where allegations regarding conditions alleged by tenant provided a basis for a claim for breach of warranty of habitability). With respect to her request for an order as to Verizon's wiring of the Building, defendants contend that Truppin has not demonstrated any entitlement to have Verizon as its provider of internet and other services and that, in any event, any request for such relief should be stayed pending the outcome of an administrative proceeding brought by Verizon before the New York State Public Service Commission ("PSC"), seeking orders of entry for various multiple dwellings include the Building. See Exhibit D to the complaint. Truppin counters that the assertion of a breach of warranty of habitability claim does not preclude her from also seeking declaratory relief.

"The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations." James v. Alderton Dock Yards, 256 NY 298, 305 (1931); see CPLR 3001. While it has been held that declaratory relief may be inappropriate where there is an adequate remedy at law in the form of damages or offset of rent (Bartley v. Walentas, 78 AD2d at 312), where "a genuine, justiciable controversy exists" the existence of such a remedy does not require the court to decline to render a declaratory judgment. See Senaca Ins. Co., Inc. v. Lincolshire Management, Inc., 269 AD2d 274, 275 (1st Dept 2000); Morgenthau v. Erlbaum, 59 NY2d 143, 148, cert denied 464 US 993 (1983)(holding that existence of other adequate remedies does not require the

dismissal of a claim for declaratory relief).

Here, at least at this juncture, it cannot be said that breach of warranty claim would provide an adequate remedy for the relief sought in the cause of action for a declaratory judgment and, in any event, as indicated above, the existence of such remedy would not require the court to deny a request for declaratory relief. See Nasaw v. Jemrock Realty Co, 225 AD2d 385 (1st Dept 1996)(trial court properly declined to dismiss tenant's cause of action for declaratory relief in connection with issues surrounding elevators in building); see generally, 43 NYJur2d Declaratory Judgments § 135 (Nov. 2016). That said, however, Truppin's request for declaratory relief with respect to Verizon providing various services to the Building, which is currently the subject of an administrative proceeding, should be stayed pending the resolution of such proceeding. See e.g., Shapiro v. Eimicke, 143 AD2d 556 (1st Dept 1988)(holding in abeyance appeal of order requiring landlord to restore telephone switchboard services pending the determination of Article 78 proceeding pending the outcome of further administrative proceedings); 170 West 85th Street HDFC v. Jones, 176 Misc2d 262 (Civ Ct NY Co. 1998)(staying hold over proceeding seeking eviction of a tenant from a cooperative apartment pending completion of proceedings before the city's Human Rights Commission).

The next cause of action, for injunctive relief, alleges that "[p]laintiff has no adequate remedy at law," and seeks "a permanent injunction requiring defendants to provide reasonable access to the subject building and subject premises for the purposes of hiring a licensed and insured contractor of her own choosing, to perform work repairing the conditions and/or making repairs as set forth in the complaint" (Complaint, ¶'s 73, 74).

Defendants argue that the cause of action for injunctive relief should be dismissed as it is

a form of remedy and not a separate cause of action and, in any event, if such a claim exists it is dependent on the merit of the substantive claims asserted, and requires a showing that damages are not recoverable. Plaintiff counters that the claim is sufficiently pleaded, and that damages do not provide an adequate remedy for the relief sought.

Contrary to defendants' argument, New York recognizes a cause of action for injunctive relief, and courts have found such a remedy appropriate where damages do not provide an adequate remedy for a continuing breach of the warranty of habitability. Bartley v. Walentas, 78 AD2d at 314-315; see generally, Finkelstein, New York Practice Series, Landlord and Tenant Practice in New York, Injunctive Relief, § 9:105 (Dec 2016). As it cannot be said at this stage of the proceeding whether damages will provide a sufficient remedy, defendants' request to dismiss this cause of action is denied.

As for the final cause of action for attorneys' fees, it alleges that the conduct of defendants "constitutes breaches of obligations owed to plaintiff, and, if permitted by law, entitle plaintiff to reasonable attorneys' fees ...[and] demands from Cambridge Development, LLC, a judgment for her reasonable attorneys' fees, costs and disbursements in connection with this action pursuant to RPL § 234 and/or otherwise, if applicable" (Complaint ¶'s 76, 77).

"Under the general rule, attorneys' fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule." A.G. Ship Maintenance Corp v. Lezak, 69 NY2d 1, 5 (1986). Defendants argue that claim for attorneys' fees must be dismissed as the complaint alleges no statutory or contractual basis for such a claim. Truppin counters that the basis for such claim is Real Property Law § 234.

Real Property Law § 234 provides that when a lease allows for a landlord's recovery of attorneys' fees resulting from a tenant's failure to perform a covenant under the lease, a reciprocal right is implied for the landlord to pay attorneys' fees incurred by the tenant as a result of the either the landlord's failure to perform a covenant under the lease or the tenant's successful defense. See Graham Court Owner's Corp v. Taylor, 115 AD3d 50, 55-56 (1st dept 2014), aff'd 24 NY3d 742 (2015).

In this case, while the allegations related to the breach of the warranty of habitability may provide a basis for a finding that defendants failed to perform a covenant under the lease (Lynch v. Leibman, 177 AD2d 453, 454-455 (1ST Dept 1991), as the complaint is devoid of allegations that the relevant lease provides for the landlord's recovery of attorneys' fees, such as would give rise to a tenant's reciprocal right to such fees based on RPL § 234, the attorneys' fee claim must be dismissed. See Graham Court Owner's Corp v. Taylor, 115 AD3d at 56; See also 1781 Riverside LLC v. Castillo, 36 Misc3d 126 (A) (App Term 1st Dept 2012)(reversing trial court's grant of attorneys' fees to tenant where tenant did not show that lease contained a provision for the landlord's recovery of litigation costs).

Accordingly, the claims for breach of the covenant of quiet enjoyment (second cause of action, constructive eviction (third cause of action), and attorneys' fees (seventh cause of action erroneously labeled as the sixth cause of action) are dismissed for failure to state a cause of action.

Res Judicata

Defendants also argue that the complaint should be dismissed on the grounds of res judicata to the extent its allegations relate to matters prior to December 8, 2011, the date that

Truppin and Cambridge entered into a stipulation of settlement to resolve a nonpayment proceeding brought by Cambridge against Truppin in the Housing Part of Civil Court of the City of New York. Truppin argues that res judicata does not apply to those issues not resolved by the settlement, and notes that while she agreed to pay Cambridge outstanding rent she also received a rent abatement.

The relevant stipulation of settlement ("the Stipulation"), which is so-ordered by the court, provides that Truppin will pay Cambridge rent due through December 31, 2011, less an abatement of $7,000. The Stipulation provides that the $7,000 abatement is "in full settlement of any and all claims that [Truppin] has or may have relating to or arising out of conditions in the subject apartment, conditions in any other apartment in the subject building and conditions in the subject building itself through the date of this stipulation, including but not limited to Truppin's defenses and counterclaims."

Under the transactional approach to res judicata adopted by New York courts, "'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy.'" Marinelli Associates v Helmsley-Noyes Co., Inc., 265 AD2d 1, 5 (1st Dept 2000)(quoting, O'Brien v City of Syracuse, 54 NY2d 353, 357 (1981), citing Matter of Reilly v Reid, 45 NY2d 24, 29-30 (1978)). In accordance with this approach, "the doctrine [of res judicata] bars not only claims that were actually litigated but also claims that could have been litigated, if they arose from the same transaction or occurrence." Id. Moreover, res judicata effect is generally afforded to determinations in summary proceedings. See McNamara v. Guazzoni, 16 AD3d 107 (1st Dept 2005)

That said, res judicata applies only when the court determining the summary proceeding would have jurisdiction over the claims brought in the second action or proceeding. See Rostant v. Swersky, 79 AD3d 456, 457 (1st Dept 2010)(prior Housing Court action did not preclude action for wrongful eviction where damages sought in connection with such claim were not recoverable in Housing Court); Eze v. Spring Creek Gardens, 85 AD3d 1102 (2d Dept 2011), lv denied 18 NY3d 804 (2012)(judgment issued in prior summary proceeding to restore possession did not bar subsequent action for wrongful eviction); Lukowsky v. Shalit, 110 AD2d 563, 566 (1st Dept 1985)(action for fraudulent inducement not barred by prior summary proceeding). Here, as the Housing Court would not have jurisdiction to afford the relief sought by Truppin for declaratory and injunctive relief, and damages for negligence, therefore, res judicata does not bar these claims.

Thus, the only remaining claim at issue is for breach of warranty of habitability. As a preliminary matter, it should be noted that the summary proceeding was resolved, not by a determination of the court on the merits which would be afforded res judicata effect (see McNamara v. Guazzoni, 16 AD3d 107 (1st Dept 2005), but by a so-ordered stipulation of settlement. See Morrison-Knudsne Co., Inc. v. Contenental Cas. Co., 181 AD2d 500, 501 (1st Dept 1992)(personal injury settled before final judgment did not have res judicata effect). A settlement which results in the discontinuation or dismissal of the proceeding or action "'with prejudice,' raises a presumption that the "stipulation is to be given res judicata effect in a future litigation" See North Shore-Long Island Jewish Health System, Inc. v. Aetna US Healthcare, Inc., 27 AD3d 439 (2d Dept 2006), quoting Singleton Management, Inc. v. Compere, 243 AD2d 213, 216 (1st Dept 1998); see generally, Siegel Practice Commentaries, McKinney's Cons Law of

NY, Book 7B CPLR 3217:15 at 736.

Here, there is no language in the Stipulation stating that it has been discontinued with prejudice, nor have defendants provided evidence that the summary proceeding was dismissed or discontinued with prejudice. See Stuart Realty Co. v Rye Country Store, 296 AD2d 455 (2d Dept 2002)(res judicata did not apply based on settlement agreement in proceeding for unpaid rent where the record did not reflect an entry of judgment dismissing the action); compare Fifty CPW Tenants Corp v. Epstein, 16 AD3d 292 (1st Dept 2005)(stipulation of discontinuance "with prejudice" of cooperative indemnification and contribution claims against contractor in prior action barred on res judicata grounds cooperative's claims against contractor to enforce guarantees arising out of same work allegedly performed by contractor). That said, however, and as Truppin acknowledges, the Stipulation demonstrates the parties' intent to resolve the claims for rent due and owing, and the rent abatement for the period at issue in the special proceeding (from April, 2010 through and December 2011), and therefore that part of her claim for breach of warranty of habitability seeking a rent abatement or damages for that period is barred. See Ebanks v. 547 West 147th Street Development Fund Corp, 37 AD3d 290, 291 (1st Dept 2007)(as stipulation of settlement resolved petitioners' obligations with respect to outstanding arrears during the period at issue in the summary proceeding, the cooperative was barred from bringing subsequent proceeding to recover the same arrears).

Accordingly, the motion to dismiss on res judicata grounds is granted only to the extent of barring that part of Truppin's claim for breach of warranty of habitability seeking a rent abatement or damages for the period from April 2010 to through December 31, 2011

Statute of Limitations

A cause of action for breach of the warranty of habitability is governed by a six year statute of limitations. See CPLR 213(2); Witherbee Court Associates v. Greene, 7 AD3d 699, 701 (2d Dept 2004). Defendants argue Truppin's claim for breach of warranty of habitability is untimely to the extent it contains allegations as to conditions existing more than six years prior to the commencement of the action on March 17, 2016. Truppin acknowledges that cause of action is limited to those allegations relating to six years prior to the commencement of this action.

Accordingly, defendants' motion is granted to the extent of finding that Truppin's claim for breach of warranty of habitability is restricted to those allegations relating to conditions existing, or conduct occurring, on or after March 17, 2010.

Conclusion

In view of the above, it is

ORDERED that defendants' motion to dismiss for failure to state a cause of action is granted to the extent of dismissing the claims for breach of the covenant of quiet enjoyment (second cause of action), constructive eviction (third cause of action), and attorneys' fees (seventh cause of action, erroneously labeled as the sixth cause of action); and it is further

ORDERED that defendants' motion to dismiss on statute of limitations grounds is granted to the extent that the breach of warranty claim is limited to those conditions existing on or before March 17, 2010; and it is further

ORDERED that to the extent the complaint seeks relief related to Verizon's attempt to wire the Building for high speed internet, TV and telephone access, such relief is stayed pending the outcome of the administrative proceeding before the New York State Public Service Commission with respect to Verizon's access to the Building or further order of the court; and it

is further

ORDERED defendants' motion to dismiss on res judicata grounds is granted only to the extent of barring that part of Truppin's claim for breach of warranty of habitability seeking a rent abatement or damages for the period from April 2010 to through December 31, 2011 and is otherwise denied; and it is further

ORDERED that defendants' motion to dismiss on the ground on another action pending is granted only to the extent of consolidating this action for joint trial and discovery purposes with Shultz v. Cambridge et al, Index No. 106632/2009, which is also pending before this court; and it is further

ORDERED that upon payment of appropriate calender fees, the filing of notes of issue and statements of readiness in each of the actions, and upon service of a copy of this order with notice of entry on the Clerk of the Trial Support Office (Room 158), said Clerk shall place the aforesaid actions upon the trial calendar for a joint trial; and it is further

ORDERED that a status conference shall be held in this action and Shultz v. Cambridge et al, Index No. 106632/2009, in Part 11, room 351, 60 Centre Street, on March 2, 2017 at 9;30 am.

DATED: January 27, 2017

HON. JOAN A. MADDEN
J.S.C.