Bartis v Harbor Tech, LLC.
2014 NY Slip Op 33809(U)
June 16, 2014
Supreme Court, Kings County
Docket Number: 501635/13
Judge: Debra Silber

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 16th day of June, 2014.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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JASON BARTIS, ET AL.,

Plaintiffs,

- against -

Index No. 501635/13
Mot. Seq. # 1 & 2

HARBOR TECH, LLC.,

Defendant.

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The following papers numbered 1 to 16 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3, 4, 6-8
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	
Affidavit (Affirmation)	
Other Papers Memoranda of Law and Affidavits	5, 9-16

Upon the foregoing papers, plaintiffs Bartis *et al.* (plaintiffs) move for: (a) partial summary judgment, pursuant to CPLR 3212, on their first cause of action; (b) a declaration that the building located at 5 Delevan Street, 19 Delevan Street and 14 Verona Street in Brooklyn, New York, is subject to the Rent Stabilization Law and Code of New York State; (c) certifying the class in this action; and (d) dismissing the affirmative defenses of defendant

Harbor Tech, LLC (Harbor Tech or defendant).[1] Defendant moves, pursuant to CPLR 3212, for partial summary judgment dismissing the first through fourth causes of action of the complaint.

Overview

Plaintiffs are tenants of the buildings located at 5 Delevan Street, 19 Delevan Street and 14 Verona Street in the Red Hook section of Brooklyn, New York (the building). The primary relief plaintiffs seek is a declaration that their apartment units are subject to the Rent Stabilization Law and that a default rent formula should be applied to their leases. In this regard, plaintiffs argue that the Building is subject to rent stabilization because defendant failed to "substantially rehabilitate" 75% of the building in violation of Rent Stabilization Code (RSC) (9 NYCRR) § 2520.11 (e) (1), and failed to comply with all applicable building codes in violation of RSC § 2520.11 (e) (5). Defendant/owner, on the other hand, moves to dismiss the first four causes of action of the complaint, all of which relate to the plaintiff's claim that the building is subject to rent-stabilization, arguing that the building is exempt from rent stabilization under the Emergency Tenant Protection Act of 1974 ([ETPA] L 1974, ch 576, § 4, as amended) § 5 [a] [5] (McKinney's Uncons Laws of NY § 8625 [a] [5]; RSC § 2520.11 [e]) because it converted several entirely commercial buildings into one building

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[1]The first cause of action seeks, among other things, a declaration that the building is subject to rent stabilization, that plaintiffs are entitled to rent stabilized leases, and that any application by defendant for rent increases are invalid. It also seeks an order directing defendant to revise all leases which incorrectly established unlawful rents and for defendant to provide rent stabilized leases to tenants who have been denied the continuation of their tenancies "on the same terms and conditions that were provided to them at the inception of their tenancies."

with residential units after January 1, 1974, at its own expense and without any tax abatement benefits which might have imposed rent regulations on the building.

Facts

The building at issue is located at 5 Develan Street, 19 Develan Street and 14 Verona Street in the Red Hook section of Brooklyn, New York. The building consists of several interconnected loft buildings of varying heights: a one-story building, a two-story building, a three-story building and two four-story buildings. Since approximately 1929, the building had been used for commercial purposes. On or about September 19, 1999, defendant purchased the building. At that time, the building was apparently vacant, the contiguous lots upon which the building was located were commercially zoned, and the building had only been used for commercial and light manufacturing purposes.

The parties agree that defendant applied for and obtained a re-zoning of the lots on which the building was located, but present differing versions of the events which occurred at that time and thereafter. In this regard, it is undisputed that in April, 2000, defendant applied to the New York City Planning Commission to re-zone the lots on which the building was located from a light manufacturing/commercial to residential. On or about February 20, 2002, the City Planning Commission adopted a resolution amending the zoning of the property from manufacturing/commercial to residential. In or about January, 2005, defendant obtained a residential temporary certificate of occupancy for the building, and in December of 2005, defendant obtained a final certificate of occupancy for the building. It reflects that the building is comprised of 100 resident units with the address 5 Delevan Street.

As indicated, the parties differ with respect to the events which occurred during this time period and thereafter. In this regard, in support of their motion for summary judgment and class action certification, plaintiffs aver that "[a]t the time of the [d]efendant's application to re-zone the building . . . approximately 40 units were occupied residentially, with the knowledge and consent of [d]efendant." Plaintiffs further state that "[i]n or about 2000, the first residential tenants began occupying units in the building . . . [and] . . . installed their own bathroom and kitchen facilities." In addition, plaintiffs contend that according to professional engineer Ari Kamo and licensed, registered architect Brenda Bello, who was hired by plaintiffs, "substantial rehabilitation work was not performed to convert the building complex to residential use in accordance with statutory requirements to qualify as exempt from rent stabilization"; "[s]ubstantial code violations remain throughout the building complex; and "work was not performed in substantial areas of the building." Plaintiffs annex the affidavit of Ms. Bello, who states that she was hired "to inspect, analyze and document the physical conditions of . . . [the building] . . . to determine whether . . . the [b]uilding's elements were code-compliant" and whether the building "was substantially rehabilitated in accordance with the rules and regulations of the New York State Division of Housing and Community Renewal ("DHCR") to qualify as housing accommodations that are exempt from the [s]tatutes, [r]ules and [r]egulations of the Rent Stabilization Code . . . ."

According to Ms. Bello, and as contested by defendant, in order for housing accommodations to qualify as exempt from the Rent Stabilization Code, the building must have been rehabilitated and 75% of the building-wide systems must have been replaced (RSC

§ 2520.11 [e] [1]). She further states that a finding of substantial rehabilitation requires that all building systems must comply with all applicable building codes (RSC § 2520.11 [e] [5]). To this end, on July 18 and 26, 2013, she and Mr. Kamo examined the following building-wide and apartment systems pursuant to the criteria set forth in DHCR Operational Bulletin 95-2 (the Operational Bulletin). The Operational Bulletin lists specific building elements which must be rehabilitated in order for a residential building to qualify as exempt from the Rent Stabilization Code, namely: plumbing, heating, gas supply, electrical wiring, intercoms, windows, roof, elevators, incinerators or waste compactors, fire escapes, interior stairways, kitchens, bathrooms, floors, ceilings and wall surfaces, pointing or exterior surface repair as needed, and all doors and frames, including the replacement of non-fire-rated items with fire-rated ones. Based on their inspection, Ms. Bello states that "only the intercoms and fire escapes were rehabilitated or replaced in accordance with relevant building codes." In addition, Ms. Bello avers that the documentation she annexes to her affidavit demonstrates that:

> "a) The plumbing system is patently defective in that the drainage system causes flooding, [sic] back-up and raw sewage flows into apartments;
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> b) The heating system violates building codes and delivers inadequate heat and not all meters are designated for individual apartments;
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> c) The gas meter rooms are not properly ventilated and [are] improperly maintained in violation of the building code and not properly fire-stopped, and are therefore a fire hazard;
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> d) There is chronic water penetration and flooding throughout the complex;
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> e) Water leaking has led to mold infestation;

f) The roof is violative of code with no protection at the perimeter [;] constant cracking and peeling;

g) The elevators were not upgraded and there are 7 open violations with DOB;

h) None of the interior stairways were rehabilitated and [they] contain numerous code violations;

i) Tenants installed their own kitchens and bathrooms due to the failure of the owner to rehabilitate these systems;

j) The floors were not replaced;

k) The ceilings and wall surfaces were not replaced[;]

l) A number of doors which lead to hallways and stairwells throughout the complex were not replaced, do not self close, and violate fire codes."

Ms. Bello concludes that because the building was not rehabilitated in accordance with the criteria set forth in the Operational Bulletin, the building is not exempt from the provisions of the Rent Stabilization Code.

In support of its own motion for summary judgment and in opposition to plaintiffs' motion for summary judgment, defendant relies upon the affidavit of Eugene Mendlowits, the manager and a member of defendant. Mr. Mendlowits avers that soon after defendant purchased the building in 1999, defendant spent approximately $3.5 million constructing and/or rehabilitating the entire building to residential use. Since the building had only been previously used as a commercial warehouse, the inside of the building was a wide-open floor plan.

According to Mr. Mendlowits, defendant performed the rehabilitation in two phases. As part of Phase I of defendant's construction and/or rehabilitation of the building, in or

around November 1999, defendant subdivided the open floor plan to create 40 1,000 square-foot commercial loft units in a self-contained portion of the four-story wing of the building. Construction was completed on the 40 units by July 2000. Repointing and waterproofing of the building were performed as necessary. In addition, during this phase of the construction, defendant built all of the demising walls (the interior walls that separate the individual units) and installed all new interior doors to the units. As indicated above, since the building was an open floor plan when defendant purchased it, there were no demising walls or interior doors at that time. Defendant also created brand-new interior building systems to service each of the 40 lofts, including the plumbing system, the heating system, the ventilation system, the gas supply system, the electrical system, and the sprinkler system. Defendant did not retain any of the existing building systems other than the existing interior stairways and the sewer waste line leading from the building to the street. Defendant also installed new intercoms and windows with respect to the 40 loft units. Further, defendant installed bathrooms, kitchens and a refrigerator in each of the newly-created loft units, although stoves were not provided. Most of the 40 loft spaces were rented and used as artist work spaces. Aside from those units, the remaining "wings" of the building were entirely vacant at this time.

According to Mr. Mendlowits, and as indicated above, "[s]oon after purchasing the building, [defendant] decided that, rather than commercial loft redevelopment, residential development was the 'highest and best use' of the building, and planned its subsequent construction accordingly." In this regard, the block on which the building was located was

bordered on the south, east and southwest by residential districts, and the building was in close proximity to shopping, a park, a school, a church, and public transportation. Therefore, in about April, 2000, prior to the issuance of any leases to tenants, defendant applied to the New York City Planning Commission to re-zone the lots on which the building was located. The re-zoning of the lots would allow defendant to convert the building from commercial to residential use. On or about February 20, 2002, the City Planning Commission adopted a resolution amending the zoning from commercial to residential. After this resolution, defendant began offering leases to new tenants and renewing existing, residential leases.

According to Mr. Mendlowits, defendant began Phase II of its construction and rehabilitation of the building in September, 2000, which continued until September, 2002. During Phase II of the project, defendant built an additional 60 loft units also measuring approximately 1,000 square feet each. With the 60 additional units, there were now a total of 100 residential loft apartments in the building. Just as with Phase I, during Phase II, defendant constructed all of the demising walls, and installed all new interior doors, new intercoms and new windows for those newly-created 60 loft units. In addition, defendant created brand new building systems to service each of the 60 units, namely the heating, plumbing, electrical, gas and sprinkler systems that serviced the remainder of the building. Defendant did not retain any of the existing building systems for the remainder of the building, other than the existing interior stairways and the sewer waste line leading from the building to the street. Also, as with Phase I, defendant installed new bathrooms, kitchens,

and a refrigerator[2] in each of the newly-constructed 60 units, since none existed previously, although stoves were not provided. Finally, and as indicated above, defendant states that in or about January, 2005, it obtained a residential temporary certificate of occupancy, and in December of 2005, it obtained a final certificate of occupancy for the building.

In their memorandum of law in support of their motion for summary judgment, plaintiffs concur, as indicated above, that defendant purchased the property in September 1999, but make no explicit reference to the $3.5 million rehabilitation allegedly performed by defendant. Instead, plaintiffs reiterate that the building was "immediately leased to [p]laintiffs and others to be utilized as commercial lofts before the re[-]zoning to residential use occurred in 2002." Specifically, plaintiffs aver that "[w]hile re-zoning to residential use occurred in 2002, the leases that were provided to [them] and the conditions in the buildings remained [sic] commercial to this day." They further state that their uncontradicted expert affidavits and documentation prove that "[t]he building maintains to this date all the characteristics and building elements found in a commercial building," and that the cases cited by defendant which address an exemption from rent stabilization apply to buildings "actually converted by the owner to residential use" which, according to plaintiffs, is not the case here.

Specifically, plaintiffs rely on the affidavits of plaintiff/tenants Douglas Fanning, Nida Lee, Andrew Coates, Craig LaCourt, and Jason Bartis to support their contention that the "commercial leases comport with the actual conditions in the building," and that the building

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[2]It appears, based upon the affidavits of some of the plaintiffs, that the refrigerators were not full size.

was not upgraded for residential use. For example, plaintiffs assert that "pursuant to lease obligation [sic] and building conditions," they are "obligated to operate their own heating system at their own cost and expense"; are responsible for providing heat for the common hallways; and that upon assuming their tenancies, they "completed basic bathroom systems in accordance with their commercial lease" by installing "bathing and plumbing fixtures." Plaintiffs also contend that cooking facilities were never installed by defendant, that they provided their own "kitchen systems," and that their commercial leases explicitly indicated that cooking facilities were not included.

In particular, and representative of the five plaintiffs/tenants noted above who supplied affidavits in support of plaintiffs' memorandum of law, plaintiff/tenant Douglas Fanning, a registered architect, avers in his January 14, 2014 affidavit that he has lived in the building for 12 years. He states that when he moved into his apartment (on or about 2002), he was provided with a commercial lease which indicated that he would be required to provide his own cooking facilities, and that residential occupancy was not being offered pursuant to the terms and conditions of the lease. Mr. Fanning further avers that he invested substantial time, effort and resources in completing his apartment so that it would be fit for residential use. In this regard, Mr. Fanning states that he purchased a stove and paid a plumber to connect it to a capped gas line; converted a hand-held shower line to create "the semblance of a shower in the mop basin [defendant] provided in the bathroom"; added a bathtub; renovated his kitchen to "make it functional for cooking"; purchased a new refrigerator when the small refrigerator which had been provided broke; bought and installed

a new sink faucet when the existing one failed; "installed new walls, new cabinets, shelves, a counter top and lighting"; and "created a second floor bedroom out of steel and wood, a staircase and closets on the main floor."

Mr. Fanning also lists several problems he has encountered in his apartment, including windows too difficult to open, electrical outlets spaced too far apart for residential use; old factory floors which illegally run through apartments; walls built without sufficient layers of fireproof drywall for the proper two hours' residential fire protection required between residential units; floors, ceiling and sprinkler pipes in the walls which are not properly fire-stop sealed, creating a potential fire-spreading hazard; illegal hookup of his boiler to the radiator in the hallway, which he pays to heat; and insufficient heat in the winter.

Mr. Fanning also disputes that the building has been upgraded from commercial to residential use. In this regard, he avers that the same flooring and freight elevator exists from the previously-utilized commercial building, that "kitchens were not provided that contained cooking facilities," that bathrooms did not include functioning showers, and that he pays for heating the common hallway because there is no central boiler system.

In addition, Mr. Fanning states that the building's owner and architect have filed sworn statements with the Department of Buildings (DOB) asserting that they have fulfilled the rehabilitation of the building to residential code. However, he avers that the drawings filed with the DOB include a passenger elevator which was never installed, and that the tenants of the building are forced to walk up unsafe stairwells. Mr. Fanning also avers that he has reviewed the documents on file at the DOB and asserts that when the owner of the

building filed for a residential certificate of occupancy, no additional work was done to alter the premises from commercial to residential use. He contends that the DOB filing references an earlier alteration permit which constituted the work that was completed prior to the premises being rented, which did not convert the building to residential use. He further states that the DOB relied upon the owner's architect's self-certification; however his "research indicates that the filing architect had his self-certification revoked for a period of time based upon false filings and certifications with the D.O.B.," and that in any event, "the requisite work to complete a residential conversion has not been completed," which he alleges is confirmed by plaintiffs' expert architect and engineer.

Affidavits from four other plaintiffs/tenants are annexed to plaintiffs' memorandum of law. These four tenants also list various complaints about their apartments and, for the reasons stated by Mr. Fanning, also dispute that defendant has upgraded the building from commercial to residential use.

In its reply memorandum of law in support of its motion for partial summary judgment, defendant reiterates that it spent over $3.5 million dollars, or an average of $35,000 for each of the 100 newly-created dwelling units, on taking "'what was essentially an empty shell of an old commercial factory building and creat[ing] 100 unique residential loft apartments'" (Reply Memorandum of Law, p. 6, quoting Mendlowits Aff., at ¶ 10).

In April, 2013, plaintiffs commenced the instant "verified class action complaint," seeking "declaratory, equitable and injunctive relief, as well as monetary damages, as a result of [d]efendant's illegal classification of the building . . . as exempt from the Rent

Stabilization Laws ('RSL') of the State of New York." Specifically, the complaint alleges that defendant "unlawfully and fraudulently characterized residential units as rehabilitated and/or market rate units and has charged illegal and exorbitant rent increases"; that "[d]efendant has blatantly violated General Obligation Law ('GOL') and RSL and Rent Stabilization Code ('RSC') in charging illegal amounts for security deposits and has failed to maintain separate interest-bearing accounts for the maintenance of security deposits in accordance with the GOL and RSC"; that "[d]efendant has failed to adhere to the basic provisions of the Warranty of Habitability, Section 235-b of the Real Property Law[,] in that significant code provisions relating to the health, safety and welfare of tenants are being violated"; and that "[d]efendant has falsely filed plans and certifications with the City of New York, Department of Buildings, [falsely] asserting that individual units and building systems were rehabilitated, renovated or modified" to fraudulently obtain an exemption from the rent regulatory statutes of New York in order to obtain unlawful rent increases (Complaint, ¶¶1-5).

The complaint contains seven causes of action. The first cause of action seeks a declaration that the building's units are rent stabilized; the second cause of action seeks damages based upon promissory estoppel, namely defendant's purported promise that the building's units were *not* rent stabilized, upon which plaintiffs relied to their detriment by not asserting their rights under "rent regulation," including but not limited to, filing rent overcharge complaints; the third cause of action seeks monetary damages and equitable relief based upon illegality and mistake stemming from defendant's offer of leases with market rate

rents; and the fourth cause of action alleges a violation of GBL § 349 through, among other things, defendant's "marketing and advertising its apartments as unregulated at unlawful amounts." The fifth cause of action alleges breach of the warranty of habitability in violation of Real Property Law § 235-b; the sixth cause of action alleges conversion and commingling of plaintiffs' security deposits and seeks injunctive relief directing their return; and the seventh cause of action seeks attorneys' fees (Complaint, ¶¶117-152). With respect to class certification, the complaint alleges that the proposed class consists of "all current, former and future tenants of the building complex who have been, or are currently being, or will be provided with unlawful leases and charged illegal rent increases and have been unlawfully charged illegal security deposits" (Complaint, ¶104).

In May, 2013, defendant interposed its answer with affirmative defenses and counterclaims, in which it generally denied the allegations of the complaint. The twenty-fourth affirmative defense alleges that the building is not subject to the Rent Stabilization Law or the EPTA because the buildings which comprise the new building were commercial buildings that were substantially rehabilitated by defendant for residential use after January 1, 1974.

In September, 2013, plaintiffs made the instant motion seeking partial summary judgment on their first cause of action (rent stabilization status), class action certification, and dismissal of defendant's affirmative defenses. In December, 2013, defendant made the instant motion for partial summary judgment to dismiss the first four causes of action of the

complaint. These motions are presently before the court for disposition, after oral argument thereon.

Discussion

"The ETPA [Emergency Tenant Protection Act of 1974] provides coverage for all housing accommodations except those which it does not expressly exempt" (*Acevedo v The Piano Building LLC*, 2008 NY Slip Op 31504 [U], [Sup Ct, NY County 2008], *affd* 70 AD3d 124 [2009], citing McKinney's Uncons Laws of NY § 8625 [a]; *Salvati v Eimicke*, 72 NY2d 784, 791 [1988]). "[S]ection 5 (a) (5) of the Emergency Tenant Protection Act of 1974 (McKinney's Uncons Laws of NY § 8625 [a] [5] [as added by L 1974, ch 576, § 4) exempts from stabilization 'housing accommodations in buildings completed or buildings substantially rehabilitated as family units on or after' January 1, 1974" (*Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 194 [2011], quoting EPTA § 5 [a] [5]). "A building that has been completely renovated for residential use after December 31, 1973, is therefore exempt from stabilization coverage" (*id.*, citing *Wilson v One Ten Duane St. Realty Co.*, 123 AD2d 198, 201 [1987] where a commercial building was similarly converted to residential).

Likewise, "[s]ection 2520.11 (e) of the Rent Stabilization Code [9 NYCRR [RSC]) exempts from rent regulation housing accommodations in buildings completed or substantially rehabilitated as family units after January 1, 1974" (*Matter of Trabucchi v New York State Div. of Hous. & Community Renewal*, 2009 NY Slip Op 31579 [U], [Sup Ct, NY County 2009]; *see also 446 Realty Co. v Higbie*, 186 Misc 2d 632, 635 [2000], *affd in part, modified in part* 196 Misc 2d 109 [App Term, 1st Dept 2003]; *appeal denied* 2004 NY App

Div LEXIS 196 [1st Dept 2004]). "This regulation is based upon Emergency Tenant Protection Act of 1974 ([ETPA] L 1974, ch 576, § 4, as amended) § 5 (a) (5) (McKinney's Uncons Laws of NY § 8625 [a] [5])" (*446 Realty Co.,* 186 Misc 2d at 635). Specifically, RSC § 2520.11 (e) exempts from rent stabilization:

> "(e) housing accommodations in buildings completed or buildings substantially rehabilitated as family units on or after January 1, 1974, except such buildings which are made subject to this Code by provision of the RSL or any other statute that meet the following criteria, which, at the DHCR's discretion, may be effectuated by operational bulletin":

"[T]he purpose of the exemption from rent stabilization based on the substantial rehabilitation of a building is to encourage landlords to renovate buildings and add new residential units to the housing stock" (*22 CPS Owner LLC v Carter,* 84 AD3d 456, 457 [2011], *lv dismissed* 17 NY3d 950 [2011]; *Eastern Pork Prods. Co. v New York State Div. of Housing & Community Renewal,* 187 AD2d 320, 324 [1992] ["the basic purpose of the exemption is to increase the number of habitable family units available to the residents of our city"]; *446 Realty Co.,* 186 Misc 2d at 637 ["This limited exemption to the rent stabilization laws is designed to encourage real rehabilitation of buildings for residential living purposes and to increase habitable family units available to New York City residents."]; *Copeland v New York State Div. of Hous. & Community Renewal,* 164 Misc 2d 42, 48 [1994] [same]; *Jordan Mfg. Corp. v Lledos*, 153 Misc 2d 296, 300 [1992], quoting *Wilson,* 123 AD2d at 201 ["the exemption was created 'to give the landlord the investment incentive of the recoupment of his rehabilitation costs free of a stabilized rent.'"]). "The mechanism by which this is accomplished is to encourage building owners to substantially rehabilitate commercial, or

substandard or deteriorated housing stock by permitting them to recoup their expenses free of stabilized rents" (*Eastern Pork Prods. Co.,* 187 AD2d at 324; *see also 81 Russell Street Assocs. v Scott*, 163 Misc 2d 984, 986 [1995]).

"[I]n order for this exemption to apply, the court must determine two issues" (*Jordan Mfg. Corp.,* 153 Misc 2d at 299). First, "whether the building was substantially rehabilitated" (*id.*, citing *Pape v Doar*, 160 AD2d 213 [1990]). Second, "whether it was the owner, as opposed to the tenants, who paid for the rehabilitation" (*id., citing Wilson,* 123 AD2d 198). "If the tenants paid for the renovation, then the property is not exempt as to do so would be a 'ridiculous perversion' of Unconsolidated Laws § 8625 (a) (5)" (*id.* at 301, quoting *Wilson,* 123 AD2d at 201).

In defining the term substantially rehabilitated, the court in *Pape v Doar* (160 AD2d 213 [1990] held that Unconsolidated Law § 8625 (a) (5) must be strictly construed and should be interpreted "in conjunction with provisions entitling owners of rent-stabilized buildings to rent increases for major capital improvements." More recently, relying upon both *Wilson* and *Jordan*, the Appellate Division, First Department held that "the conversion of a purely commercial space into an almost purely residential space . . . is a substantial rehabilitation so as to exempt the building from rent stabilization" (*22 CPS Owner LLC*, 84 AD3d at 457; *see also Jordan Mfg. Corp.,* 153 Misc 2d at 301 [Where renovation serves only to "change purely commercial space into purely residential space . . . the creation of residential units where none existed is a substantial rehabilitation so as to exempt these buildings from stabilization"]; *155 Wooster, LLC v Dalrymple,* 21 Misc 3d 138 [A], 2008

NY Slip Op 52306 [U], [App Term, 1st Dept 2008] [building was substantially rehabilitated by landlord's predecessor after January 1, 1974, and thus exempt from rent stabilization where "evidence was sufficient to establish that the prior owner spent over $200,000 to rehabilitate all of the building's major systems, *so as to convert commercial space to a 'class A' multiple dwelling*."] [emphasis added].

DCHR Operational Bulletin 95-2, referenced in RSC § 2520.11 (e), and relied upon by plaintiffs as the standard by which "substantial rehabilitation" must be determined, was issued by the DHCR "to clarify the procedures the agency will use to determine issues of exemption from rent regulation due to substantial rehabilitation" (Operational Bulletin 95-2, p. 1). The Operational Bulletin, which essentially tracks the language of RSC § 2520.11 (e), provides that a particular building at issue must meet the following criteria to qualify for substantial rehabilitation:

> "A. At least 75% of the building-wide and apartment systems contained on the following list must each have been completely replaced with new systems. Additionally, all ceilings, flooring and plasterboard or wall surfaces in common areas must have been replaced; and ceiling, wall, and floor surfaces in apartments, if not replaced, must have been made as new as determined by DHCR.
>
> List of Building-wide and Apartment Systems:
>
> 1. Plumbing
> 2. Heating
> 3. Gas supply
> 4. Electrical wiring
> 5. Intercoms
> 6. Windows
> 7. Roof
> 8. Elevators
> 9. Incinerators or waste compactors

10. Fire escapes
11. Interior stairways
12. Kitchens
13. Bathrooms
14. Floors
15. Ceilings and wall surfaces
16. Pointing or exterior surface repair as needed
17. All doors and frames including the replacement of non-fire-rated items with fire-rated ones

However, for good cause shown, on a case-by-case basis, limited exceptions to the stated criteria regarding the extent of the rehabilitation work to be effectuated building-wide or as to individual housing accommodations may be granted where the owner demonstrates that a particular component of the building or system has recently been installed or upgraded so that it is structurally sound and does not require replacement, or that the preservation of a particular component is desirable or required by law due to its aesthetic or historic merit.

B. The rehabilitation was commenced in a building that was in a substandard or seriously deteriorated condition. The extent to which the building was vacant of residential tenants when the rehabilitation was commenced shall, in addition to the items described in III "Documentation," constitute evidence of whether the building was in fact in such condition. Where the rehabilitation was commenced in a building that was at least 80% vacant of residential tenants, there shall be a presumption that the building was substandard or seriously deteriorated at that time.

Space converted from nonresidential use to residential use need not meet this standard.

C. DHCR will not find the building to have been substantially rehabilitated if it can be established that the owner has attempted to secure a vacancy by an act of arson resulting in criminal conviction of the owner or the owner's agent, and/or DHCR has made an outstanding finding of harassment, as defined pursuant to any applicable rent regulatory law, code or regulation.

D. All building systems comply with all applicable building codes and requirements, and the owner has submitted copies of the building's certificate of occupancy before and after the rehabilitation.

> E. The Substantial Rehabilitation provision is intended to encourage the creation of new or rehabilitated housing. Accordingly, in making a determination as to the eligibility of a building for this exemption, DHCR will consider all facts that support this policy.
>
> F. Where occupied, rent regulated units have not been rehabilitated, such units shall remain regulated for the duration of occupancy by the regulated tenants, notwithstanding a finding that the remainder of the building has been substantially rehabilitated and qualifies for exemption from regulation."
>
> [emphasis added]

I. Substantial Rehabilitation

A. Arguments

In support of their motion for partial summary judgment, plaintiffs argue that the building meets the statutory criteria for rent stabilization coverage under RSC § 2520.11 (e) and Operational Bulletin 95-2 because: 1) the building contains a residential Certificate of Occupancy; 2) was built before 1974; 3) contains more than six units; 4) has substantial building code violations; and 5) has not been rehabilitated in accordance with the Rent Stabilization Code and the regulations established by the DHCR (i.e. Operational Bulletin 95-2), as demonstrated by their documentary evidence and annexed affidavits. In their memorandum of law, plaintiffs revise their argument somewhat, asserting that RSC § 2520.11 (e) requires a finding, which they claim is absent here, that at least three conditions must be met before a building may be deemed to have been substantially rehabilitated, namely: 1) a building built or completed after January 1, 1974; 2) 75% replacement of building-wide and individual housing unit's systems; and 3) compliance with applicable building codes.

In support of its motion for partial summary and in opposition to plaintiffs' motion for partial summary judgment, defendant argues that the building has always been exempt from rent regulation, since it was converted from commercial to residential use. Relying upon *CPS Owner LLC v Carter* (84 AD3d 456 [2011]) and *Jordan Mfg. Corp. v Lledos* (153 Misc 2d 296 [1992]), defendant contends that where, as here, the building was converted from 100% commercial to 100% residential use after January 1, 1974, the exemption of section 5 (a) (5) of the EPTA from rent stabilization applies as a matter of law.

Defendant also argues that under the circumstances present (complete conversion from commercial to residential use after January 1, 1974), the standards set forth by RSC § 2520.11 (e) and Operational Bulletin 95-2 are inapplicable to determine issues of the building's eligibility for exemption from rent regulation due to substantial rehabilitation. Specifically, defendant states that "[w]ith very few exceptions not applicable here, residential units built from scratch after [January 1, 1974] are[,] from inception[,] market apartments that are not subject to rent regulation." In this regard, defendant argues that the Rent Stabilization Code (RSC § 2520.11[e] [1]) refers only to *replacing* residential systems in existing residential units, and/or buildings, as opposed to installing completely new systems in newly built residential units. Defendant makes the same argument with respect to the Operational Bulletin, namely that "the regulation applying the 75 percent rule applies only when an already rent stabilized *residential* building is being upgraded and the owner wants to remove the building from rent stabilization by satisfying the substantial rehabilitation

exemption." In short, defendant contends that "[t]he DHCR's 75% requirement simply does not control new units built after January 1, 1974."

Defendant also alleges out that the Operational Bulletin applies only to matters pending before the DHCR and not to cases brought in court, and that even as to matters brought before the DHCR, "the Operational Bulletin *by its terms* is only meant to set forth *guidelines* for determination of substantial rehabilitation" (*see* Operational Bulletin, p. 1 [This Operational Bulletin "is being issued at this time to clarify the procedures the *agency* will use to determine issues of exemption from rent regulation due to substantial rehabilitation"] [emphasis added]). Defendant argues that the fact that the 75% requirement does not apply to post-1973 newly built residential units or to requests for judicial determinations is additional compelling proof that *22 CPS Owners LLC* and *Jordan Mfg. Corp.* must be followed here. In any event, defendant asserts that even if the Rent Stabilization Code and the Operational Bulletin were to be applied under the facts of this case, it met the 75% requirement due to its extensive rehabilitation of the various building systems.

Finally, defendant contends that plaintiffs' allegations of *current* (post Certificate of Occupancy) code violations are irrelevant as to whether the building was substantially rehabilitated. Defendant reiterates that RSC § 2520.11 (e) and the Operational Bulletin are inapplicable to instances of total conversion from commercial to residential use, and need not be followed by the court. In any event, defendant asserts that even under the inapplicable Rent Stabilization Code and Operational Bulletin standards, plaintiffs have failed to present

any evidence that the building was not code compliant *at the time of the substantial rehabilitation*, namely when the building was converted to residential use.

Defendant annexes two DHCR decisions which found that the buildings at issue were exempt from rent stabilization pursuant to RSC § 2520.11 (e) because they were converted from commercial to residential use (*see Matter of Fraydun Enterprises*, DHCR Admin. Review Docket No. EG430024RO [July 20, 2001]; *Matter of Nick Conway*, DHCR Admin. Review Docket No. ZC210022RO [December 6, 2011]). Defendant concludes that in applying the controlling precedent of *22 CPS Owners LLC,* the court should dismiss the first four causes of action of the complaint, since they all involve claims relating to the rent stabilized status of the building.

In their memorandum of law in further support of their motion, and in reply to "defendant's submissions," plaintiffs reiterate that the RSC § 2520.11 (e) and the Operational Bulletin are in fact the standards which apply to determine whether the building has been substantially rehabilitated. Plaintiffs assert that even assuming that defendant converted the building from commercial to residential use, defendant has not satisfied the other criteria set forth in RSC § 2520.11 (e) and Operational Bulletin 95-2 and shown that the building has been substantially rehabilitated. In this regard, plaintiffs contend that defendant has misinterpreted RSC § 2520.11 (e) by arguing that once it has met at least one criterion of the statute, the court may disregard the other eight criteria demonstrating substantial rehabilitation. According to plaintiffs, RSC § 2520.11 (e) "explicitly provides that "buildings completed or buildings substantially rehabilitated as family units on or after January 1, 1974,

. . . that meet the following criteria . . . ," will be exempt from the rent stabilization laws." [3] Plaintiffs assert that defendant may only claim an exemption from rent stabilization under the provisions for "buildings substantially rehabilitated . . . after January 1, 1974" (as opposed to "housing accommodations in buildings completed . . . after January 1, 1974) because the building was built in 1929.

To be clear, plaintiffs argue that to obtain the benefit of a finding that a building has been "substantially rehabilitated," RSC § 2520.11 (e) requires that the building owner meet the nine criteria set forth in this code section. As such, plaintiffs contend that defendant intentionally misinterprets this provision because it is unable to satisfy the first criterion, the 75% replacement of building-wide and apartment systems, and the fifth criterion, compliance with all applicable building codes. With respect to the Operational Bulletin, plaintiffs point out that although, in the case of conversions from nonresidential use to residential use, an owner is relieved from demonstrating that the building is in "substandard or seriously deteriorated condition," neither the Operational Bulletin or any statute or code provision relieves the owner of satisfying all of the other criteria in the Bulletin to demonstrate substantial rehabilitation. Accordingly, plaintiffs dispute the relevance of *22 CPS Owners*

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[3]RSC § 2520.11 states: "This Code shall apply to all or any class or classes of housing accommodations made subject to regulation pursuant to the RSL or any other provision of law, except the following housing accommodations for so long as they maintain the status indicated below: (e) housing accommodations in buildings completed or buildings substantially rehabilitated as family units on or after January 1, 1974, except such buildings which are made subject to this Code by provision of the RSL or any other statute that meet the following criteria, which, at the DHCR's discretion, may be effectuated by operational bulletin . . . ."

LLC (84 AD3d 456), as well the other cases cited by defendant, and argue that, unlike here, the issue of whether the apartment in *22 CPS Owners LLC* had been substantially rehabilitated was not in dispute. In contrast, plaintiffs maintain that in this case, the building was never properly converted to residential use under the rent stabilization laws and code, and that there is no "automatic exemption," as defendant urges, for such conversion.

Plaintiffs also argue that it is disingenuous for defendants to argue that the conditions in the building differed upon its completion of the alleged rehabilitation as compared to the conditions on the date plaintiffs' experts conducted their inspection; and that, in short, the building "remains commercial," i.e. it "maintains to this date all the characteristics and building elements found in a commercial building."

In its reply memorandum of law, defendant argues, among other things, that plaintiffs have failed to rebut or have ignored the controlling case law regarding commercial buildings converted to residential use. Specifically, defendant asserts that rather than addressing or meaningfully distinguishing the case law on which it relies, plaintiffs merely argue that "a few of the hundreds of tenants in the building made some optional improvements to their own individual units and have complaints about certain alleged building conditions." Defendant asserts that the fact that a few tenants may have added stoves or other relatively minor improvements to their apartments is insufficient to accord them, much less all of the tenants, rent-stabilized status. In addition, defendant contends that the tenants' other complaints are amenable to resolution and, if meritorious, full redress through their breach of the warranty of habitability cause of action. Specifically, with respect to *22 CPS Owners*

LLC (84 AD3d 456), defendants point out that the court did not address the criteria set forth in the Rent Stabilization Code or the Operational Bulletin because "the creation of entirely new dwelling units out of commercial space "was *itself* the 'substantial rehabilitation,'" which is made clear by the other decisions which plaintiffs have failed to address. Defendant also notes that plaintiffs fail to address the fact that the DHCR has no jurisdiction at all over apartment units that were built after January 1, 1974.

In addition, defendant asserts that plaintiffs repeatedly misconstrue defendant's citation to *22 CPS Owners LLC* and other relevant cases as defendant's claim that an "automatic exemption" from rent regulation exists for units in buildings converted from commercial to residential use after January 1, 1974. Defendant maintains that it has never made this argument. Rather, defendant acknowledges that a landlord must also show that the costs of the conversion were not "substantially borne by the tenants" (*Wilson*, 123 AD2d at 201). On this issue, defendant argues that plaintiffs' claim that they paid for the majority of the rehabilitation is incredible as a matter of law. In this regard, defendant contends that plaintiffs' only consistent complaint is that they were not initially provided with a stove - which they misleadingly refer to as "cooking facilities" - or a shower head. However, defendant states that while both the New York City Housing Maintenance Code and the state's Multiple Dwelling Law require a landlord to provide gas or electricity for cooking, neither requires the landlord to provide the appliances themselves; that it is not required to provide showerheads, although defendant states that it provided a shower facility which plaintiffs/tenants were easily able to modify to suit their preferences; and that the remaining

"essential" renovations claimed by plaintiffs amount to a laundry list of optional items that plaintiffs/tenants elected to install, which a landlord is not required to provide, nor are the items listed in any way essential to the warranty of habitability.

B. Conclusions of Law

Defendant has made a *prima facie* showing that the building is exempt from rent stabilization. Defendant has demonstrated, through the affidavit of Mr. Eugene Mendlowits, the managing a member of defendant, that the first residential units in the building were not built until 2000, a fact which plaintiffs do not dispute, and that defendant spent approximately $3.5 million constructing and/or rehabilitating the entire building from commercial to residential, converting in two phases between 2000 and 2002, an old commercial factory building into 100 residential loft apartments. In this regard, and as noted above, defendant has established that since the building had only been used previously as a commercial warehouse, the inside of the building was a wide-open floor plan; that as part of Phase I of the construction, in or around November 1999, defendant subdivided the open floor plan to create 40 1,000 square-foot commercial loft units in a self-contained portion of the four-story wing of the building, that it built all of the demising walls, installed all new interior doors to the units, and created brand-new interior building systems to service each of the 40 loft units, including the plumbing system, the heating system, the ventilation system, the gas supply system, the electrical system, and the sprinkler system.

Further, other than the existing interior stairways and the sewer waste line leading from the building to the street, defendant did not retain any of the existing building systems,

installed new intercoms and windows with respect to all 40 commercial loft units, and installed bathrooms, kitchens (except for providing stoves) and a refrigerator in each of the newly-created 40 commercial loft units. Although defendant was initially required to offer tenants commercial leases because of the zoning status of the building, in February, 2002, defendant's application to re-zone the lots on which the building was located was granted by the City Planning Commission, and thereafter, defendant began offering new tenants and renewing tenants residential leases. Finally, from September 2000 to September, 2002, defendant built an additional 60 residential loft units, and rehabilitated those units and the accompanying building-wide and individual housing accommodation systems and amenities in the same manner as the first 40 units, for a total of 100 newly-created residential loft apartments in the building, which did not previously exist. In short, defendant has established that since the building was an entirely commercial building that was converted at defendant's expense after January 1, 1974, into 100 residential loft units, it is exempt from rent regulation under the ETPA (*22 CPS Owner LLC,* 84 AD3d at 457; *see also Jordan Mfg. Corp.,* 153 Misc 2d at 301; *155 Wooster, LLC,* 21 Misc3d 138 [A], 2008 NY Slip Op 52306 [U], *1-2 [App Term, 1st Dept 2008]).

Contrary to plaintiffs' argument, *22 CPS Owners, LLC* (84 AD3d 456) is controlling precedent. There, the landlord moved for summary judgment seeking a declaration that the penthouse apartment in its building was exempt from rent stabilization coverage (*22 CPS Owners, LLC v Carter,* 2010 NY Slip Op 31508 [U], *3 [Sup Ct, NY County]). In that case, the building had undergone a conversion from a primarily commercial use building to a

primarily residential use building (*id.* at 4). The Supreme Court held that the penthouse was exempt from rent stabilization because it had been owner-occupied during the period the building had received J-51 tax benefits (*id.*, at 11-12). The Appellate Division, First Department, affirmed the ruling of the Supreme Court, although on different grounds. It ruled that:

> "The penthouse has not been subject to rent stabilization *since its creation*, when the building *was converted from a purely commercial space to an almost exclusively residential space (except as to the ground floor which remained commercial)*. Because the purpose of the exemption from rent stabilization based on the substantial rehabilitation of a building is to encourage landlords to renovate buildings and add new residential units to the housing stock . . . *the conversion of a purely commercial space into an almost purely residential space, creating 23 residential units when none existed, is a substantial rehabilitation so as to exempt the building from rent stabilization*" (*22 CPS Owner LLC,* 84 AD3d at 457 [internal citations omitted] [emphasis added]).

22 CPS Owners LLC relied upon *Jordan Mfg. Corp* (153 Misc2d 296), which involved the renovation of a four-story loft building into seven residential apartment units in 1983 (*id.* at 297). In determining whether the apartments were exempt from rent stabilization under the substantial rehabilitation exemption, the court first found that "[i]n cases where the area renovated is divided between commercial and residential use," the issue is the "extent of the *commercial* rehabilitation" (*id.* at 300). In this regard, the court held that:

> "Where the building's use remains 'primarily commercial', an incentive for recoupment is not required because the landlord is expected to recoup his investment from the commercial use of the building. In cases where the building was primarily

> residential, and where rent stabilization existed prior to the renovation, or where units were added so that rent stabilization subsequently applied to the building, an exemption is not required unless renovations are so extensive that they cannot be recouped under the rent stabilization laws. This protects tenants by keeping their apartments regulated while permitting the landlord to make necessary improvements or even add apartments" (*id.*).

The court went on to find that where a building is converted from commercial to residential use after January 1, 1974, the exemption applies as a matter of law. In this regard, the court ruled that:

> "*Wilson* [123 AD2d 198 (1st Dept 1987)] . . . and the case at bar, may be distinguished from these cases [supra] insofar as in *Wilson and the case at bar* the renovation served only to change purely commercial space into purely residential space. Under such circumstances, where there has been no renovation to the part of the building maintaining its commercial use, the recoupment for the landlord can only come from the rent charged for the residential units. In addition, there is no need to protect existing tenancies with rent regulation as such tenancies did not exist prior to the renovation. *In such cases, the creation of residential units where none existed is a substantial rehabilitation so as to exempt these buildings from stabilization.* It is this possibility for quick recoupment which exists as an incentive to commercial building owners to invest in creating apartment units in underutilized commercial space. Thus, the building in the case at bar meets the substantial rehabilitation requirement of *Pape v Doar* [160 AD2d 213] []" (*id.* at 301) (emphasis added) (*id.* at 301).

The circumstances here do not involve a "primarily commercial" building to which some renovations were made or a previously rent-regulated building which was rehabilitated. Rather, defendant has made a prima facie showing that the subject buildings underwent a

conversion from commercial to residential use after January 1, 1974, at a cost of approximately $3.5 million for the conversion.

Defendant has also made a prima facie showing that it paid for the majority of the costs of the rehabilitation. Although in *Jordan Mfg. Corp.,* the court held that there was a question of fact as to whether the costs of the rehabilitation were paid for by the landlord or the tenants (the tenants claiming they paid 90% of the total cost of rehabilitation), in this case, defendant has established that it expended approximately $3.5 million on the building's rehabilitation, and that in comparison, plaintiffs have only paid for a relatively small number of items, even when those costs are considered in their aggregate.

In support of their motion for partial summary judgment, and in opposition to defendant's motion, plaintiffs have failed to establish that the building is subject to rent stabilization, and have failed to rebut defendant's prima facie showing. As noted above, plaintiffs argue that RSC § 2520.11 (e) and the Operational Bulletin are the standards which apply when determining issues of exemption from rent regulation due to substantial rehabilitation; that even assuming the building was converted from commercial to residential use, defendant has not met the "many other necessary criteria for 'substantial rehabilitation;'" and that in any event, defendant has not converted the building from commercial to residential use - because "the conditions in the buildings remain commercial to this day."

As an initial matter, plaintiffs have not distinguished *22 CPS Owners LLC*, the controlling case with respect to the rent stabilized status of the building. While plaintiffs argue that *22 CPS Owners LLC* is distinguishable because, unlike this case, there was no

dispute that the building in *22 CPS Owners LLC* had been converted from a commercial to a residential space. Plaintiffs seem to concede that *22 CPS Owners LLC* exempts buildings from rent stabilization which are built before 1974, which have actually been converted from commercial to residential use. In any event, as defendant contends, the criteria set forth in RSC § 2520.11 (e) and the Operational Bulletin were simply not discussed by the Appellate Division or the Supreme Court in *22 CPS Owners LLC*. Accordingly, the court finds, as the Appellate Division held, that the creation of an entirely new building with residential apartment units out of what had been commercial space is *itself* a "substantial rehabilitation" (*22 CPS Owners LLC,* 84 AD3d at 457).

In response, plaintiffs argue that no such "automatic exemption" from rent regulation exists for units in buildings converted from commercial to residential use after January 1, 1974. However, the exemption for building conversions from commercial to residential use does not constitute an "automatic exemption." Rather, a landlord must make a prima facie showing that the building has in fact been converted from a purely commercial use to an almost purely residential use (*id.*; *Jordan Mfg. Corp.*, 153 Misc2d at 301; *155 Wooster, LLC,* 21 Misc3d 138 [A], 2008 NY Slip Op 52306 [U], *1-2 [App Term, 1st Dept 2008]; *Matter of Fraydun Enterprises*, DHCR Admin. Review Docket No. EG430024RO; *Matter of Nick Conway*, DHCR Admin. Review Docket No. ZC210022RO) and that the costs of the conversion were not "substantially borne by the tenants" (*Wilson*, 123 AD2d at 201). Here, defendant has made a prima facie showing that it has converted a purely commercial building into a residential building, having created 100 new residential loft units, and that it paid for

the majority of the costs of that conversion. Moreover, despite plaintiffs' contention that the building "remains commercial," plaintiffs concede that the building has operated under a residential Certificate of Occupancy since 2005.

Further, defendant correctly argues that the plain meaning of the provisions on which plaintiffs rely reveal that they are not applicable where a commercial building is converted to residential use. In this regard, the provisions refer to *replacing* residential systems in existing residential units, as opposed to installing completely new systems in newly built residential units. Specifically, RSC § 2520.11 provides, in relevant part, that:

> "This Code shall apply to all or any class or classes of housing accommodations made subject to regulation pursuant to the RSL or any other provision of law, except the following housing accommodations for so long as they maintain the status indicated below:
>
> * * *
>
> (e) housing accommodations in buildings completed or buildings substantially rehabilitated as family units on or after January 1, 1974, except such buildings which are made subject to this Code by provision of the RSL or any other statute that meet the following criteria, which, at the DHCR's discretion, may be effectuated by operational bulletin:
>
> (1) a specified percentage, not to exceed 75 percent, of listed building-wide and individual housing accommodation systems, must have been *replaced*"; (emphasis added).

The Operational Bulletin similarly provides, with respect to the 75% requirement, that "[a]t least 75% of the building-wide and apartment systems contained on the following list must each have been completely *replaced* with new systems" (emphasis added). These provisions are reasonably interpreted to apply only when an already rent-stabilized building is being

upgraded to remove the building from rent stabilization by satisfying the substantial rehabilitation exemption. Moreover, this provision conflicts with the circumstances present here, namely where a commercial building has been completely converted to residential use. As defendant points out, replacement of building-wide systems has no relevance where, as here, no "individual housing accommodations" previously existed and completely new residential loft units were created from scratch. It is undisputed that defendant created brand-new interior building systems to service each of the 100 residential loft units. Further, as defendant asserts, the Operational Bulletin's inclusion of "kitchens" in the list of items that must be "completely replaced" also has no relevance with respect to a building which was previously commercial in which kitchens were required to be built from scratch. The same argument holds true with respect to "bathrooms," since the building's individual bathrooms had to be built from scratch for each apartment, with bathing facilities for residential use, as opposed to commercial use.

Equally relevant, and unaddressed by plaintiffs, is that the Operational Bulletin is only applicable to matters pending before the DCHR, and not to cases brought in court. In *Matter of Trabucchi* (2009 NY Slip Op 31579 [U], *12 [Sup Ct, NY County 2009]), the court held that:

> "Section 2520.11 (e) of the Rent Stabilization Code merely eliminates properties substantially rehabilitated after January 1, 1974 from DHCR's jurisdiction. According to DHCR, it has not been empowered to promulgate regulations regarding such buildings and has merely tried to make the boundaries of its jurisdiction clear through Operational Bulletin 95-2. . . . [The] Operational Bulletin merely provides that an owner 'may apply

> to the DHCR for an advisory prior opinion that the building qualifies for the exemption . . . .'" (*id.*).

Similarly, in *446 Realty Co.* (186 Misc 2d at 636), the court held that because "DHCR's policies concerning the substantial rehabilitation section of the ETPA constitute statutory reading and analysis, dependent upon accurate interpretation of legislative intent, an area within the province of the courts, as opposed to an understanding of underlying operational practices or evaluation of factual data, the court is not bound by DHCR's standards for substantial rehabilitation" (*id.* [internal citations omitted]). This is supported by the Bulletin itself, which is meant "to clarify the procedures the agency will use to determine issues of exemption from rent regulation due to substantial rehabilitation."

Plaintiffs have also failed to make a prima facie showing that defendant did not substantially rehabilitate the building and have failed to rebut or overcome defendant's showing of substantial rehabilitation. Relying on their affidavits and the expert affidavit of their architect, Ms. Bello, plaintiffs argue that the building "remains commercial" even after the rehabilitation. The affidavit of Ms. Bello fails to support plaintiffs' claims. First, the purpose of Ms. Bello's review of the building was to determine whether the building was compliant with the building code and whether the building was substantially rehabilitated pursuant to RSC § 2520.11 (e), namely whether 75% of certain listed building-wide and individual housing accommodations were replaced. However, plaintiffs reliance upon RSC § 2520.11 (e) is misplaced, as this is not the correct standard by which substantial rehabilitation is determined.

In any event, Ms. Bello's 4-page affidavit and her Architect Report fail to demonstrate that the building was not actually converted from commercial to residential use. In particular, Ms. Bello's affidavit only states in conclusory fashion that defendant did not substantially rehabilitate the building (*see generally Dalder v Incorporated Vil. of Rockville Ctr.*, 116 AD3d 908, *3-4 [2014]; *Littles v Yorkshire Bus. Corp.*, 114 AD3d 646 [2014]; *Reddy v 369 Lexington Ave. Co., L.P.*, 31 AD3d 732 [2006]). Specifically, Ms. Bello asserts that on July 18 and 26, 2013, she and Mr. Kamo, an engineer who has not submitted an affidavit, inspected 17 building-wide and apartment systems (those listed on the Operational Bulletin noted above) and concluded that "only the intercoms and fire escapes were rehabilitated or replaced in accordance with relevant building codes." Ms. Bello goes on to state that "the documentation set forth in detail in our report annexed hereto demonstrates that" various building systems were defective, violative of various building codes, and/or not rehabilitated" (*supra*).

However, apart from listing the defects and violations she found upon her visual inspection (*supra*), Ms. Bello makes no specific reference in her affidavit to the purported defects/violations which are allegedly set forth in the Architect Report to support her conclusions. The Architect Report consists of a series of Ms. Bello's observations, lengthy building code text, black and white photographs, graphs, an unexplained flow chart, most of which requires further explanation for the layman, as well as correspondence, which constitutes hearsay. Thus, despite the fact that the Report contains a key ("HOW TO READ THIS REPORT"), and follows a certain thread ("building inspection observations and

applicable notes are outlined in a single line black box" with code references and text beneath), the key provides limited assistance to the court in discerning its content. Moreover, while Ms. Bello concludes, for example, that certain systems have not been replaced or have been only partially replaced, she provides no support for this conclusion, either in her affidavit or the Architect Report. In addition, the cited code violations do not raise an issue of fact as to whether or not the building was substantially rehabilitated because this finding "fail[s] to challenge the documented fact that the renovation converted [a commercial building into 100 residential loft apartments] . . . [which is] work that would necessarily involve a total or gut renovation of [all the stories] in the [B]uilding] and the construction of new rooms, including kitchens and bathrooms, with their attendant plumbing, electrical and structural concerns" (*Matter of Trabucchi,* 2009 NY Slip Op 31579 [U], *10 [Sup Ct, NY County 2009]). Accordingly, Ms. Bello's affidavit and Report lack sufficient probative value, and therefore fails to rebut defendant's showing that defendant substantially rehabilitated the building.[4]

In any event, defendant argues that even if the 75% requirement under the Rent Stabilization Code and Operational Bulletin applied to the facts of this case, it has satisfied

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[4]It should be noted that Ms. Bello asserts in her affidavit that the "[t]enants installed their own kitchens and bathrooms . . ." . (Bello Aff., ¶ 12 [I]). However, in her Report, Ms. Bello asserts that "kitchens were not installed per approved plans" and that "[m]any tenants installed their own cooking equipment," (Report, pp. 51-21), suggesting that kitchens were installed. However, these statements by Ms. Bello are not based upon personal knowledge, and thus are not competent to refute defendant's prima facie showing. Moreover, in the five affidavits provided by plaintiffs/tenants, while some say they purchased and installed their own stoves, none of them state that they installed their own kitchens. The evidence is the same with respect to the purported installation of bathrooms by plaintiffs/tenants. While some say they installed showerheads, cabinets, a tub, and a fixture to hold a shower curtain for a corner shower, none state that they installed their own bathrooms.

this requirement. The DHCR 75% requirement for determining substantial rehabilitation requires that 75% or 17 of the building systems on the Operational Bulletin's list (above) must be replaced. Since, as plaintiffs' architect concedes in her Architect Report, there are no incinerators or waste compactors in the building, the number of building systems required for replacement is reduced to 16. Thus, defendant must establish that 12 of the 16 systems have been "completely replaced with new systems" unless "the owner demonstrates that a particular component of the building or system has recently been installed or upgraded so that it is structurally sound and does not require replacement, or that the preservation of a particular component is desirable or required by law due to its aesthetic or historic merit" (Operational Bulletin 95-2, at 2). As defendant points out, plaintiffs concede that it has met the standard with respect to the intercoms and fire escapes (Architect Report, p. 5 - "Completely Replaced or made New? - "yes" to both).

Further, as verified by the affidavit of Mr. Mendlowits, 10 of the other systems were either replaced or newly created (Mendlowits Aff., ¶¶14-17, 25-29, 33, 40 [plumbing, heating, gas supply, electrical wiring, windows, roof, kitchens, bathrooms, doors and frames, and ceilings and wall surfaces of individual units]), and "Pointing or exterior surface repair as needed" was also performed "as necessary" (*id.* at ¶13). Two other systems, the interior stairways and floors, were "structurally sound and [did] not require replacement" (*id.* at ¶¶ 40-41). As such, defendant has established that 15 of the 16 required systems were either

completely replaced or made new, or did not need replacement, satisfying the 75% requirement.[5]

In opposition, plaintiffs have failed to raise an issue of fact. Although Ms. Bello asserts that her inspection of 17 building-wide systems showed that only the intercoms and fire escapes had been replaced, she fails to provide sufficient support for this conclusion in either her affidavit or her Report.

The affidavits of plaintiffs/tenants also fail to raise an issue of fact as to whether defendant failed to meet the 75% requirement. In this regard, four of the five plaintiffs/tenants who submitted affidavits state that defendant has not upgraded from commercial to residential use because:

> "[t]he same flooring exists from the previously utilized commercial building, the same freight elevator exists, kitchens were not provided that maintained cooking facilities, the bathrooms did not include functioning showers, and [that they] pay for heating the common hallways as there is no central boiler system" (Fanning Aff., Lee Aff., Coates Aff., Bartis Aff.)."[6]

Their statements with respect to the floor does not raise an issue of fact as to whether the floor was "structurally sound and [did] not require replacement," as asserted by Mr.

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[5]Mr. Mendlowits does not specifically state that the ceilings were replaced but indicates that the demising walls (the interior doors to the units) were newly constructed. These walls did not exist when defendant first purchased the building because the building was an open floor plan. Thus, it is likely that new ceilings were installed as well. Even assuming that the ceilings were not installed, defendant has still demonstrated that it complied with the 75% requirement by establishing that 14 of the 16 required systems were either completely replaced, made new or did not need replacement.

[6]Plaintiff/tenant LaCourt only references the flooring, the elevator and kitchen. Further, three of the five plaintiffs/tenants who submitted affidavits also state that "proper drainage and protection from flooding has not been provided" (Lee Aff., Coates Aff., Bartis Aff.)

Mendlowits in his affidavit. Further, defendant was not required to provide a stove for the kitchens (NYC Administrative Code § 27-2070 [a]) and plaintiffs do not supply the court with any authority that shows that defendant was required to provide them with a showerhead for the bathroom shower. In addition, although defendant did not replace the elevator, defendant has still established that it complied with the 75% requirement. Finally, even assuming that plaintiffs/tenants' references to the lack of a central boiler raise an issue of fact with respect to the heating system, defendant has still complied with the 75% requirement by fulfilling 13 of the 16 criteria (assuming the ceilings were not newly constructed as part of the Renovation).

Plaintiffs have also failed to make a prima facie showing that the building is in violation of RSC § 2520.11 (e) (5), which provides that "in order for there to be a finding of substantial rehabilitation, all building systems must comply with all applicable building codes and requirements, and the owner must submit copies of the building's certificate of occupancy, if such certificate is required by law, *before and after the rehabilitation*" (emphasis added). Plaintiffs argue that the building does not qualify as having been substantially rehabilitated because Ms. Bello's 2013 inspection found various Building Code violations. However, as already discussed, defendant has demonstrated that the standards set forth in the Rent Stabilization Code and the Operational Bulletin are inapplicable when a building has been totally converted from commercial to residential use (*see 22 CPS Owners, LLC; Jordan*). Second, defendant correctly asserts that even under those inapplicable standards, plaintiffs have failed to provide any evidence that building didn't

comply with all applicable Building Codes *at the time the building underwent its rehabilitation*, from 2000 to 2002. Plaintiffs' only proof of building code violations is Ms. Bello's Architect Report which, to the extent it is probative (*supra*), lists only *current* alleged code violations, based upon Ms. Bello's visual inspection, as opposed to the building's code compliance at the time the Certificate of Occupancy was issued after the residential conversion. As defendant notes, the EPTA, the Rent Stabilization Code and the Operational Bulletin do not contain any provisions which operate to reverse the status of a building otherwise exempt from rent stabilization as a result of building code violations discovered years after it has been substantially rehabilitated. Nor have plaintiffs cited any case law on this point.

Moreover, the only competent evidence submitted with respect to the building's compliance with the Building Code is the building's Certificate of Occupancy, effective December 30, 2005, after the building was converted to residential use. The Certificate "certifies that the premises described herein conforms substantially to . . . all applicable laws, rules and regulations for the uses and occupancies specified." Lastly, despite plaintiffs' contention, the requirement of RSC § 2520.11 (e) (5) that the landlord "submit copies of the building's certificate of occupancy, if such certificate of occupancy is required by law, before and after the rehabilitation," is at least some evidence that the building's post-rehabilitation Certificate of Occupancy is relevant to the question of whether the building was compliant with the Building Code at the time the building was substantially rehabilitated.

Plaintiffs have failed to make a prima facie showing that they paid for the majority of the building's conversion and have failed to rebut defendant's showing that defendant paid for the majority of the building's conversion. In particular, plaintiffs have failed to support their claims with records or affidavits that, among other things, "[d]efendant relied upon [p]laintiffs labor and resources to accomplish a purported conversion to residential use," that they "were responsible for any alleged 'completion' and/or 'rehabilitation' of their units," or that they "expended substantial resources completing kitchens, bathrooms, and paying to heat the common area."

As an initial matter, plaintiffs have only provided five affidavits from the 35 named plaintiffs/tenants and none from the "hundreds of current and former tenants" of the building. On the whole, the affidavits demonstrate that plaintiffs were required to buy their own stoves and showerheads, and that the remaining items purchased were either optional items and amenities defendant was not required to provide, or items needed because of construction defects or code violations in the building - which serve as a basis for plaintiffs' warranty of habitability causes of action. For example, Mr. Fanning avers in his affidavit that he paid $800 for a stove and for a plumber to connect it to a gas line, and paid a total of $20,000 to convert a hand-held shower hose in the "mop basin" which defendant provided in the bathroom into a normal shower by installing a bathtub and tiling in the bathroom; to make the kitchen "functional for cooking" [no further details provided]; to purchase a new refrigerator and new sink faucet for the kitchen; and to install new walls, new cabinets, shelves, a counter top and lighting [unspecified location]; to create a second floor bedroom

out of steel and wood; and a staircase and closets on the main floor. Ms. Lee avers that she spent $1,000 to purchase and install "cooking equipment and plumbing fixtures to convert a waist-high copper pipe protruding from the wall to a functioning shower, and paid $4,000 to install garment closets and additional lighting. Mr. Coates avers that he "invested substantial resources" in cleaning, repairing and painting his apartment before he moved in (in 2005), and that he installed ceiling fans and an industrial wall fan to ameliorate mold/mildew issues. Mr. LaCourt states that he constructed stairs to the second level above the kitchen ($500); installed interior walls ($4,000); purchased and installed a stove ($1,000); installed a sink and counter top after the original sink leaked and the counter top discolored ($700); installed a dishwasher and cabinets ($1,200); bought a full-sized refrigerator after the refrigerator defendant provided broke ($900); installed a ceiling fan ($500); installed bathroom lighting and cabinets; refinished the floors; and painted the apartment ($2,000), all by his own labor.

Finally, Mr. Bartis avers that when he moved in, he paid for a stove and connection to a gas line; purchased a hand-held shower (defendant provided a threaded copper pipe extending from the wall at waist level with a three-inch deep shower base); paid for the rod to hold the shower curtain and a masonry bit and anchors to do the installation; installed surface mounted electrical conduits throughout the unit; replaced a defective exhaust fan three times; and replaced the faucet in the kitchen and bathroom when they broke after normal use.

Despite this showing, the amounts expended by plaintiffs, even when considered in their totality, are minimal when compared to the $3.5 million paid by defendant to rehabilitate the building. Moreover, as defendant correctly notes, the bulk of the renovations performed by Mr. Fanning (bathtub, new walls, new cabinets, shelves, counter top, lighting, second bedroom), Mr. LaCourt (dishwasher, ceiling fans, stairs to second level), and Ms. Lee (garment closets and additional lighting) consist of optional items they elected to install that defendant was not required to provide.[7] Thus, even taking into account the above improvements, plaintiffs have failed to show that the total rehabilitation costs of the building were substantially borne by them (*Wilson*, 123 AD2d at 201).

Plaintiffs also ask that upon declaring the building to be rent stabilized, the court should establish lawful rents for the units, pursuant to the "default formula" as set forth by the Court of Appeals in *Thornton v Baron* (5 NY3d 175 [2005]). However, the request for this relief has been rendered moot because the court has determined that the building is exempt from rent stabilization. Even if the building was not exempt, the default formula only applies "in situations where there are substantial indicia of fraud," which is absent here (*Matter of Watson v New York State Div. of Hous. & Community Renewal (N.Y.S.D.H.C.R.)*, 109 AD3d 833, 834 [2013]). In light of the foregoing, defendant's motion to dismiss the first four causes of action of the complaint on the ground that the building is exempt from the

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[7]Notably, plaintiffs concede that defendant provided them with a shower area. While it appears that this shower area was a bit rudimentary, namely a shower base with a waist-high pipe to which a shower head and hose could be attached, there is no dispute that it functioned as a shower.

Rent Stabilization Law is granted. That branch of plaintiffs' motion for partial summary judgment on its first cause of action to declare the units rent stabilized is denied.

II. Class Certification

Plaintiffs seek to certify the named tenants as a representative of a class in this action. The complaint alleges that the proposed class consists of "all current, former and future tenants of the building complex who have been, or are currently being, or will be provided unlawful leases and charged illegal rent increases and have been unlawfully charged illegal security deposits" (Complaint, ¶ 104).

CPLR 901 (a) provides, in pertinent part, that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all if:

> 1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
>
> 2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
>
> 3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> 4. the representative parties will fairly and adequately protect the interests of the class; and
>
> 5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

"CPLR article 9 . . . is to be liberally construed" (*Smilewicz v Sears Roebuck & Co.*, 82 AD3d 744, 745 [2011]). "The primary issue on a motion for class certification is whether the claims as set forth in the complaint can be efficiently and economically managed by the court on a classwide basis" (*Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129,

136-137 [2008]). "The class representative has the burden of establishing the prerequisites of certification" (*id.*). "The determination to grant class action certification rests in the sound discretion of the Supreme Court, and any error should be resolved in favor of allowing the class action" (*id.* [internal citations and quotation marks omitted]).

"The proponent of class certification bears the burden of establishing the criteria promulgated by CPLR 901 (a)" (*Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 422 [2010]). "General or conclusory allegations in the pleadings or affidavits are insufficient to sustain [the] burden [of the class representative]" (*Rallis v City of New York*, 3 AD3d 525, 526 [2004]). Accordingly, "[a] class action certification must be founded upon an evidentiary basis" (*id.* [internal citation and quotations marks omitted]).

Here, plaintiffs have failed to sustain their burden (*id.*). Addressing CPLR 901 (a) (2), plaintiff contends that common questions of law and fact predominate because the litigation involves a single building complex and a single landlord, and because the question of damages is dominated by two common issues: (1) how to determine a tenant's base rent, and (2) how to devise a formula for calculating damages.

As an initial matter, defendant correctly points out that a single common issue does not satisfy the predominance requirement. Rather, class certification requires, among other things, that "questions of law or fact common to the class predominate over any question affecting individual members." In any event, at this juncture, because the court has concluded that the building is exempt from rent stabilization, the only real substantive claim common to the proposed class is the cause of action alleging breach of the warranty of

habitability. However, as defendant persuasively argues, this claim is premised upon the unique conditions of 100 individual apartments, and thus is not amenable to proceeding by way of a class action.

Moreover, plaintiffs have not shown that questions of law or fact common to the class predominate over any questions affecting individual members. In this regard, defendant notes, and the record confirms, that plaintiffs have only annexed two leases in support of their motion, which are facially contradictory. To certify the class, the court should examine every lease in the proposed class. The difficulty of this task is compounded by the fact that plaintiffs have not supplied the court with any evidence as to when most of the tenants moved into the building, whether the leases provided to the tenants were uniform and whether only certain tenants, or all of them, have individual warranty of habitability claims.

In any event, as defendant points out, the court in *Adler v Ogden Cap Props., LLC* (42 Misc 3d 613 [2013]), addressed the difficulty of class certification for breach of warranty of habitability claims. In *Adler*, plaintiffs sought to represent a class of all renters in the State of New York against a defendant class of all landlords in the State of New York, to obtain rent rebates for violations of the warranty of habitability caused by Hurricane Sandy (*id.* at 615). Finding that the Court of Appeals in *Park West Management Corp. v Mitchell* (47 NY2d 316 [1979]) held that each warranty of habitability case "must . . . turn on its own peculiar facts," the *Adler* court held that it would only consider "a plaintiff class limited to specific buildings where it can be demonstrated that the tenants of such buildings endured similar conditions and received similar mitigation" (*Adler*, 42 Misc 3d at 627). Even so, the

court questioned whether such a class would be viable because "mitigation may have varied apartment-by-apartment (e.g. ground floor apartments had flooding, but no elevator concerns)" and "damages (including legal costs governed by a prevailing party clause) may vary depending upon whether the tenant has a rent regulated or market lease, or even no lease at all" (*id.* at 626). Here, warranty of habitability issues will clearly require an individual assessment for each unit, making the matter inappropriate for class certification.

With respect to CPLR 901 (a) (3), the "typicality" requirement, plaintiffs assert that their claims are typical of those of the proposed class because the class representatives' claims are based on the same conduct by the landlord, assert the same legal theory, and are based on the same cause of action. To the extent plaintiff's legal theory refers to their claim that the building should be rent stabilized, they have failed to fulfill the typicality requirement since the court has already found that the building is exempt from rent stabilization. To the extent plaintiffs' legal theory is premised upon their warranty of habitability claim, they have failed to sustain their burden for the reasons noted above, namely the disparity of habitability claims, and the lack of evidence, among other things, as to whether, and to what extent, the warranty of habitability was breached with respect to the putative class members' tenancies.

Plaintiffs have also failed to sustain their burden with respect to CPLR 901 (a) (4), namely that "the representative parties will fairly and adequately protect the interests of the class." Plaintiffs argue that the named plaintiffs and putative class members share a common goal: to ensure that they are charged the maximum legal rent under the Rent Stabilization Law and Code. They also contend that the verified complaint (verified by two of the

plaintiffs), states that the named plaintiffs represent the interests of the proposed class, will prosecute the action vigorously, and have no conflicts with the proposed class. However, general or conclusory allegations in the pleadings are insufficient to sustain plaintiffs' burden of establishing compliance with the statutory requirements for class action certification under CPLR 901 (*Rallis*, 3 AD3d at 526). Moreover, plaintiffs have not submitted evidence that their proposed class counsel is highly experienced in class action litigation and has sufficient resources available to adequately protect and represent the class (*compare Hurrell-Harring v State of New York*, 81 AD3d 69, 73 [2011]; *Pesantez v Boyle Envtl. Servs., Inc.*, 251 AD2d 11, 12 [1998]).

Finally, plaintiffs have failed to demonstrate, with respect to CPLR 901 (a) (5), that a class action is "superior to other available methods for the fair and efficient adjudication of the controversy." Plaintiffs argue that this class action will conserve judicial resources by avoiding multiple lawsuits "involving the same basic facts." However, as discussed above, inasmuch as plaintiffs' remaining substantive claim is a cause of action for breach of the warranty of habitability, the disparate claims of each plaintiff/tenant do not lend themselves to adjudication via a class action (*compare Casey v Whitehouse Estates, Inc.*, 36 Misc 3d 1225 [A], 2012 NY Slip Op 51471 [U], *7 [Sup Ct, NY County 2012] [where plaintiffs seeking class action certification commenced an action seeking a declaration that apartment building was not exempt from rent stabilization, and also sought treble damages and attorneys' fees, they satisfied the requirement of CPLR 901 [a] [5]). In any event, plaintiffs have viable avenues of redress, namely, commencing individual plenary actions. In

conclusion, upon review of the plaintiffs' arguments and the relevant factors in such an application, plaintiffs have not satisfied the criteria for class certification. The branch of plaintiffs' motion seeking class certification is denied.

III. Affirmative Defenses

Plaintiffs move to dismiss defendant's twenty-fourth affirmative defense.[8] The twenty-fourth affirmative defense alleges that: "The building complex is not subject to the RSL [Rent Stabilization Law] or the ETPA [Emergency Tenant Protection Act] in that the buildings that comprise the complex were commercial buildings that were substantially rehabilitated by defendant for residential use after 1974." Since the court has already determined that the building is exempt from rent stabilization, this branch of plaintiffs' motion is denied.

Finally, to the extent there may be merit to plaintiffs' claims that the building lacks sufficient heat, hot water and/or functioning elevators, and plaintiffs' claims that the architect who self-certified the construction improperly certified work that was not completed or was not code compliant, nothing in this decision and order precludes plaintiffs, if they be so advised, from asking the Building Department or HPD to inspect for violations, or to bring

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[8]Plaintiffs' request for this relief is equivocal. In their Notice of Motion, plaintiffs seek to dismiss "[d]efendant's affirmative defense" (singular). In their Memorandum of Law, at page 5, plaintiffs state that they seek to dismiss "[d]efendant's twenty-fourth [a]ffirmative defense," but conclude, at page 18 of their Memorandum, that they seek "[d]ismissal of [d]efendant's affirmative defenses" (plural). Since plaintiffs do not include any discussion of the other twenty-three affirmative defenses, and because plaintiffs' papers already include an in-depth discussion arguing against exemption of the building from rent stabilization, the court concludes that this branch of plaintiffs' motion only seeks to dismiss defendant's twenty-fourth affirmative defense, and rules accordingly.

HP (tenant-initiated) actions in the New York City Housing Court to cure such alleged violations, or to move this court for injunctive relief. The court notes in this regard that it appears self-evident that a building of this size (100 units) is obligated to provide a functioning passenger elevator, which would make the units wheelchair accessible (*see generally Multiple Dwelling Law § 78 (1)*; *see also Administrative Code §§ 27-2005 ["Duties of Owner"]; 27-2028 [heat], 27-2013 [hot water], and 8-107(15)(a) [New York City Human Rights Law])*.

The parties' remaining contentions are without merit.

In conclusion, the defendant's motion for summary judgment dismissing the first four causes of action of the complaint is granted. Plaintiffs' motion is denied.

This constitutes the decision and order of the court.

E N T E R,

Hon. Debra Silber, A.J.S.C.

Hon. Debra Silber
Justice Supreme Court