CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS PART: TRIAL TERM PART 64

HOWARD GOTTESMAN,

Plaintiff,

-against-

THE GRAHAM APARTMENTS, INC. and DEKALB MANAGEMENT, INC.,

Defendants.

Index No. 65447/2011

DECISION and ORDER

Date(s) of Trial/Hearing:

January 16, 2013, February 27, 2013, March 15, 2013 and April 23, 2013.

PROCEDURAL HISTORY

In or about July 27, 2007, the Plaintiff, *pro se*, commenced a civil action in the Supreme Court of the State of New York in the County of Kings under Index Number 29232/2007 seeking, *inter alia*, specific performance and damages against the Defendant for (1) negligence, (2) private nuisance, (3) trespass, (4) breach of the warranty of habitability, (5) breach of contract and (6) breach of the covenant of quiet enjoyment.

In or about 2007, the Defendant, by the Law Offices of Margaret G. Klein & Associates interposed the first Answer in the Supreme Court action. (Neither party presented the first Answer to the Court.) It would appear that the parties engaged in discovery including, but not limited to, the service of a bill of particulars, discovery and inspection, and examinations before trial.

On February 7, 2011, the action was transferred to the Civil Court in the County of Kings pursuant to CPLR §325(d) and assigned Civil Court Index Number TS-300036-11/KI.

During the pendency of the Civil Court action, the Plaintiff alleged that on August 17, 2011, a second flood occurred at the subject building and apartment. In or about September 2011, the Plaintiff moved to amend the complaint. On October 6, 2011, the Hon. Nancy M. Bannon granted the motion and directed the Plaintiff to serve the amended complaint in thirty (30) days. The court record reflects that one of the parties had served a Notice of Trial and the parties adjourned the case to March 26, 2012 for trial while that motion was pending.

On October 6, 2011, the Defendant was served with Plaintiff's amended complaint and subsequently, in or about December 29, 2011, the Defendant served an amended verified answer.

On March 19, 2012, the Plaintiff served and filed a motion to amend and to supplement his bill of particulars and to add new monetary and personal property claims, and to correct an error in the original bill of particulars. On the return date, the motion was adjourned to August 3, 2012, and on that date, the Hon. Ingrid Joseph granted Plaintiff's motion to amend his bill of particulars.

In or about April 10, 2012, the Defendants served and filed an Order to Show Cause seeking, *inter alia*, an order directing the Plaintiff to engage in further discovery. On April 24, 2012, the Hon. Reginald Boddie granted the order to the extent that the Defendants were directed to engage in further motion practice and for further discovery with respect to the Plaintiff's amended complaint and supplemental bill of particulars provided that compliance with the order was within thirty (30) days.

In the interim, on June 15, 2012, the parties were referred from the trial part (TAP Part) to the undersigned judge.

The case could not be amicably resolved after a good faith conference between all of the parties and the Court, and was adjourned from June 15, 2012 to July 2, 2012 at 9:30 a.m. During that time period, the following documents were to be provided to the undersigned judge for review in an effort to resolve this case between the parties, to wit: the proprietary lease, bylaws, and house rules, if available, a breakdown of the mortgage payments and/or arrears, a breakdown of the maintenance payment and/or arrears, and a report of Dr. Gilbert and Veronica Kero.

On July 2, 2012, the parties, after substantial conference, were unable to resolve this case. The Defendant agreed to withdraw the subpoena duces tecum and the parties agreed to exchange additional discovery. The court adjourned the case for trial to October 24, 2012 and based on administrative error, was adjourned from October 24, 2012 to January 16, 2013 for trial.

The case proceeded to trial on January 16, 2013, February 27, 2013, March 15, 2013 and April 23, 2013.

FACTUAL HISTORY

In or about May 1987, the Graham Apartments, Inc., was incorporated as a New York corporation and remains a valid New York State corporation. The Graham Apartments, Inc., is the owner of the real property and building located at 3171 Whitney Avenue, Brooklyn, New York. The building is a 3-story brick structure that contains 28 residential apartments and no commercial stores. According to the parties, and the other records submitted to the Court, the Graham Apartments, Inc. is a private residential cooperative corporation as opposed

to a private residential cooperative corporation that is regulated by the state and/or city governments exclusively for low and moderate income families (e.g., Housing Development Fund Corporation).

Graham Apartments is managed by Dekalb Management, Inc. Dekalb Management, Inc. is the registered managing agent for the subject premises and manages the day-to-day operation of the property.

On January 23, 2002, the Plaintiff purchased the shares allocated to apartment 1G at the subject premises in an arm's length transaction. According to the evidence presented, the parties executed a proprietary lease, which commenced on January 23, 2002 and terminates on December 31, 2037 unless terminated sooner pursuant to the terms and conditions of the proprietary lease (Plaintiff's Exhibit "2").

The Plaintiff secured a mortgage from Citigroup (Citi Mortgage, Inc.) for a sum of $80,000.00 to purchase the cooperative apartment and the accompanying shares. The Plaintiff assumed occupancy of apartment 1G as a single adult from January 23, 2002 to August 11, 2004 and he occupied the apartment alone.

On August 11, 2004, it is undisputed that gallons of water entered apartment 1G. It is also undisputed that there was an accumulation of water in the rear and in the front of the building on the aforementioned date. According to the record, there was about an inch to an inch and a half of water above the flooring and subflooring of the apartment that irrefutably caused reparable and irreparable damages to Plaintiff's floors, carpeting, rugs, baseboards, moldings, doors, crown moldings, service lines and personal property. In addition to apartment 1G, apartments 1A, 1B and 1E were also flooded and similarly affected by the water entering the building.

Certain members of the Cooperative Board of Directors were present to observe the accumulation of water in the rear and front of the building and had the opportunity to enter the Plaintiff's apartment to observe the water damage in the subject premises. According to the Plaintiff, in direct contradiction of his complaint (see Amended Complaint at ¶ 131), he spent the night in his apartment, keeping the windows open and all ceiling fans on in an effort to help evaporate the water in the apartment. The Plaintiff, on August 12, 2004, purchased three (3) large window fans and "Damp-Rid", a moisture absorbent product, to "help evaporate/absorb the remaining water that was under the hardwood floors and the saturated carpeting." (Amended Summon and Complaint at ¶ 32).

On August 12, 2004, the Plaintiff filed a claim with his individual insurance carrier for the subject apartment-State Farm Insurance. The claim was denied on the grounds that "the loss stemmed from water entering the apartment from outside and traditional insurance policies, including Plaintiff's, only cover water losses from the inside water source (i.e. broken pipe in wall, bathtub overflow, etc.)." (Amended Summons and Complaint at ¶ 136).

Plaintiff notified the President of the management company, Pamela DeLorme, on August 11, 2004, August 12, 2004 and August 17, 2004 of the water damage and conditions of mold/mildew odor in the subject premises.

The Plaintiff claims that the Defendant did not provide the name and policy number and other pertinent information of the Defendant's insurance carrier-Greater New York Insurance Company (hereinafter referred to as "GNY") to submit his claim.

On October 8, 2004, Barry Dickerson of GNY inspected the subject premises and surveyed the property and building. On November 16, 2004, the claim was denied by GNY. To the Plaintiff, this denial was based on alleged inaccurate information supplied to the carrier by the Defendant and not based on the validity of the actual claim. Additionally, the Plaintiff stated that his insurance carrier also denied his claim. Notwithstanding the denial of the claims by both carriers, neither party performed any repairs in the apartment.

On December 1, 2004, the Defendant engaged Dr. Charles E. Gilbert, Toxicologist/Epidemiologist, and James O'Regan, Certified Environmentalist of the Epidemiology and Toxicology Institute of Hauppauge, New York to inspect the apartment.

On December 27, 2004, Dr. Charles E. Gilbert and Mr. Sarah Gilbert issued a 7-page report which found, *inter alia*, visible fungi bloom; microbial smell; the entire Maplewood floors cupped and stained; all water boards wet in all rooms; and both bacterial count and fungi count were well above acceptable legal guidelines in all the tested rooms. The report determined the presence of various penicillin and aspergillums blooms and found that the blooms were due to the water intrusion into the apartment. More relevant to the issue at hand, the report concluded that the apartment was not fit for human habitation unless the conditions are remediated. The report also established that the water ran into Plaintiff's apartment through the side walls. Lastly, the report describes the practices and procedures accepted and employed by the mold and water damage remediation industry to ameliorate the conditions in the subject apartment.

From in or about August 11, 2004 to the date of trial, the Plaintiff did not use or occupy the subject apartment as his residence.

The Plaintiff claimed that in or about February 2005, the Board of Directors approved and authorized the remediate work that was required in the subject apartment and agreed to pay for the remedial work. In reliance on the alleged agreement with the Defendants to correct the conditions in the subject apartment, the Plaintiff retained a moving and storage company to remove his property from the unit. The Plaintiff contends that members of the Board told him that he was responsible for the removal of all his personal property from the apartment and the corporation would be responsible for the expenses incurred in the remedial work. In addition, the Plaintiff claims that he paid the superintendent of building, Mr. Francisco Salcedo, to disconnect the washer and dryer from the gas lines so that the washer and dryer could be removed from the apartment.

Additionally, he made arrangements with a flooring and carpeting retailer to install new flooring after the cleanup. He allegedly made these arrangements for these installations prior to the removal of his furnishings from the apartment.

In or about March 2005, the Plaintiff states that the Board of Directors rescinded their agreement to correct the conditions. The Board of Directors were unwilling to impose yet another assessment against the shareholders to correct the conditions in his apartment. The basis of their decision, he claims, was the lack of income.

In or about October 2006, the Graham Apartments had the defective catch basin pipe repaired.

As set forth above, in or about August 13, 2011 through August 14, 2011, rain water allegedly accumulated in or about the subject premises again and permeated the Plaintiff's apartment causing "additional damage to the floor, walls and Plaintiff's personal property therein beyond what had existed since the August 2004 flood and further exacerbating and worsening the mold condition inside said apartment, which had existed since the flood in August 2004" (Amended Summons and Complaint at ¶ 237).

In or about July 27, 2007, the Plaintiff, *pro se,* commenced the instant action on the above grounds. After issue was joined, the parties engaged in extensive motion practice. After efforts of resolution failed, the parties proceeded to trial. The trial testimony and documentary evidence submitted is more fully set forth below.

TRIAL TESTIMONIAL AND DOCUMENTARY EVIDENCE

Both parties made lengthy opening statements. Briefly, the Plaintiff seeks a 100% rent abatement or alternatively, an injunction for mold remediation or an award for damages for the complete costs of the remedial work. In addition, the Plaintiff seeks punitive damages for the failure of the Board of Directors to remediate the conditions in the apartment. The Plaintiff lastly asserts rights to legal fees.

In their opening, the Defendant argues that the Plaintiff, a law graduate, with a Masters Degree in Public Administration and a captain in a New York City Police Department, acted in bad faith. The Defendant avers that this was a "money-grabbing" effort by the Plaintiff to get a windfall for 3 to 4 times the value of the subject apartment. He argues that the Plaintiff is married, has moved on, lives someplace else and sincerely believes that it was the intention of the Plaintiff to never really assume the responsibility on the lease, to clean up the apartment and to take care of it. The attorney alleges that the Defendant acted prudently under the circumstances, but the Plaintiff "disappeared". Counsel claimed that the Plaintiff never gave a key to the apartment to the Graham Apartment, Inc., never gave them access and therefore, was the cause-in-fact of the damages to the apartment.

The Plaintiff proceeded with his case-in-chief by calling himself, Howard Gottesman as his first witness. Mr. Gottesman testified that he currently resided at 1004 East 5th Street, Brooklyn, New York 11238. The subject premises is a private one-family dwelling, which he occupies with his wife and two small sons. Mr. Gottesman testified that he has a law degree and is currently employed by the New York City Police Department.

In regards to the subject building, Mr. Gottesman described the building as a 3-story building which encompasses about half of a city block with a stucco front and is light brown in color. He indicates that there are 20 apartments in the subject premises and the building does not contain a basement. Mr. Gottesman acknowledged that the building is a cooperative corporation, and that he purchased the subject premises in January 2002.

The witness testified that although he does not recall receiving a proprietary lease to the subject premises at closing of title, he has resided there since the date that he purchased the apartment. He stated that he has paid his monthly maintenance and other charges to Dekalb Management on behalf of the Graham Apartments since the inception of his tenancy. The witness testified that Plaintiff's Exhibit "1" in evidence on consent, are the maintenance payment stubs from the monthly statement that he receives from Dekalb Management. These statement stubs are dated from August 1, 2004 through and including June 30, 2011.

The witness stated that on August 11, 2004, the apartment was flooded with tremendous amounts of water. He described that the water invaded his apartment from wall to wall, specifically asserting that there was no part of the apartment that was not covered with water. The witness testified that the depth of the water was an inch to an inch and a half (1"-1½") above the hardwood floor. The area that the witness described was a hardwood floor in his living room and he described it as being at least one inch above a concrete slab. It was clear from his statements that there was new hard wood flooring installed on top of this concrete slab.

The witness stated that other parts of his apartment, specifically, the kitchen, bathroom and master bedroom did not have hardwood floors but other flooring. He testified that he looked in all of the places that a reasonable person would have looked such as the vanity, the kitchen sink and the pipes to the washer and dryer to determine the source of the flood waters. The witness then stated that he went to his window that faced the rear of the building and observed that there was nearly one foot of water in the rear of the property. The witness stated that "it looked like a swimming pool, and it was raining out and I said to myself, 'that must be where the water is coming from." (Gottesman-tr. at p. 52, lines 7-11; 1/16/2013).

As he exited the apartment, he stated Ms. Coraci, the President of the Board of Directors, and other tenants were standing and talking near the garbage compact room. The witness stated that Ms. Coraci, at one time or another, entered his apartment. At that time, the water was visible above the hardwood floors. Then, later, Ms. Coraci, identified as the Vice President, and Mr. Michael McCormick, a board member entered the

apartment to observe the conditions. In addition to the other individuals, on the same day, August 11, 2004, the witness testified that he also spoke with Ms. DeLorme, who was identified as the President of Dekalb Management, notwithstanding this conversation with Ms. DeLorne, the Plaintiff did not make any specific request of her on that evening, but did notify her of the flooding throughout the building and his apartment.

The witness further testified that he did not have a "string mop in his apartment but a sort of rectangular head mop to clean floors" (Gottesman-tr at p. 63, lines 15-17; 1/16/2013). He tried to soak up as much water as he could. However, he acknowledged, that "it was almost silly. There was so much water. It was a futile attempt to soak up all the water with what I had." (Gottesman-tr. at p. 63, lines 22-24; 1/16/2013). He further "...grabbed what, in my mind, anything that would absorb water that was readily available, like bath towels, sheets that I had and I just dumped it in the water in an effort to soak up the water, and threw it into the bathtub." (Gottesman-tr at p. 64, lines 1-5). The witness also acknowledged that the efforts that he made were not effective at all based upon the fact that there was too much water. (Gottesman-tr at p. 64, lines 6-9; 1/16/2013). The witness further testified that "later that evening, [he] opened all the ceiling fans...[as] 'it stopped raining outside.' I opened the window to try to get some fresh air into the apartment and the ceiling fans to help create a draft or a breeze to get rid of the water." (Gottesman-tr at p. 64, lines 21-25; p. 65, lines 1-5; 1/16/2013).

In addition, the witness testified that he had a window box fan which was portable, and he used that fan in the living room. He angled the fan down toward the floor where he stated that he was attempting to make an effort to get a draft going onto the water to get rid of the water. (Gottesman-tr. at p. 65, lines 2-8; 1/16/2013). Mr. Gottesman acknowledged that his efforts to remove the water did not seem to be working.

Mr. Gottesman used no further efforts that night to remove the water and acknowledged that on that night, he did not sleep in the apartment. He claimed that there were wires running in the place where the slab was exposed and did not think it was safe, contrary to his claims in the summons and complaint. (Gottesman-tr. at-p. 65, lines 17-25; p. 65, lines 1-2; 1/16/2013).

The witness further testified that he could not recall when he went back to the apartment after he stayed at his mother's home that evening. But he could distinctly remember when he did return, which may have been the next day, all he remembers seeing is dirt on the floors. At that time, the walls had water marks on them and dirt along the baseboard. The carpeting in the master bedroom was completely saturated; he remembered it sloshing when he walked on the carpeting. More than anything else, he recalled that the apartment had a mildewy smell, and tremendous amount of dampness hung in the air. (Gottesman-tr. at p. 67, lines 8-15; 1/16/2013) The witness was also clear that none of the above conditions existed in the apartment prior to the flood.

The witness goes further to describe the floors in the apartment confirming with the Court that they were one size. The flooring was level throughout except there was about a foot to 2 feet of space at the rear of the apartment where a radiator had been removed that he was able to see down onto the space between the subflooring and the main floor. The witness further testified that his hardwood floor in the living room was above a concrete slab floor. He stated that when he returned to the apartment that the space between the hardwood floors and the concrete slab was filled with water. He was able to observe this condition between the wall where the old air conditioner had been located and the installation of the new air conditioning in that area of the apartment. Based on this view, he assessed the depth of the flood waters to be one inch to one and a half inches (1"-1½").

The witness further testified that he purchased Damp Rid, which is a product that removes dampness in humid environments. This Court was familiar with this product as described on the record. The witness testified that he obtained the bucket version (which sits on the floor) and the hang up version of the Damp Rid product. He continued to purchase the Damp Rid products so that the products would absorb the moisture from the air. He continued to go in and out of the apartment to assess the condition for about six to eight weeks and during this time, the Damp Rid products took as much moisture as possible from the apartment. He stopped using the product, because according to him, the products no longer absorbed the moisture. At one point, he went to the apartment at least 4 times a week for this six to eight weeks, and subsequently, he went less often.

In addition, the witness stated that it was less than a week after the flood that he started seeing 'specks' on some of the walls which he claimed was mold. The witness further testified that he began seeing these specks between 1 to 2 weeks after the flood. He noticed the specks in the office, which was the room when you walked into the apartment. As he continued to come in and out of the apartment, he remembered that the mold became more and more visible in the closets and in other areas. The witness continued to describe how the mold looked and how the mold affected different parts of the property, specifically the closets, and was probably 2 to 3 feet from the baseboards in the apartment. (Gottesman-tr. at p. 76, lines 18-23; 1/16/2013).

The witness continued to describe that after 5 weeks, upon his entering the apartment, the condition got worse in the master bedroom, hallway and small bedroom; eventually the mold went into the kitchen. Notwithstanding the fact that the kitchen contained marble, where there was a drywall, the witness said that he started noticing little bits of mold on the drywall and many weeks down the road, 8 weeks or more, he started to notice that the cabinet above eye-level and the ones below, the wood trim on them started growing a different type of mold, almost like the kind you peel off with your hand. (Gottesman-tr. at p. 79, lines 16-25; 1/16/2013). The mold grew worse over 8 weeks after the flood. For a large part of his testimony he continued to describe the way that the mold looked and where it was located in the respective parts of the apartment. The witness testified that the mold was especially bad against the wall that was adjacent to the outside of the building.

(Gottesman-tr. at p. 80, lines 20-21; 1/16/2013). The witness described that the mold was at least 2 to 3 feet on many walls throughout the apartment, and in the closet it was wall-to-wall.

The witness further testified that, as the conditions in the apartment got worse, "realization kicked in that you can't live here. You are not going to be living here. It was very depressing thing to go back. I was going back primarily for the mail, to pick up my mail and to just make certain my apartment was not looted by someone who may have known that I did not live there anymore." (Gottesman-tr. at p. 83, lines 12-18; 1/16/2013).

The witness further testified that he got light-headed when he went into the apartment and therefore, did not remain for any substantial period of time. Although he tried and was "bent on ...staying here...I couldn't physically stay in the apartment...It was so choking the smell. You become lightheaded. I became lightheaded.... I could not live there...." Gottesman-tr at p. 84, lines 3-9; 1/16/2013).

The witness testified that at least 8 to 10 weeks after the water had come into the apartment that the Maplewood floor was stained, raised up and the door was stuck in a particular position in his office; in the second bedroom, the door did not open and close properly because it was bowing. The witness testified about the condition of the floors throughout the apartment describing them as "cupped and bowed" in certain spots and water stained throughout the apartment.

He further testified that he was only able to stay there an hour and a half and at that point, he was forced to vacate the apartment, because it was a very "toxic" environment. (Gottesman-tr at p.86, lines 16-23; 1/16/2013).

Additionally, the witness testified that he used all kinds of chemical products including commercial chemical products to remove the mold from the walls but found that the mold was inside of the walls and notwithstanding his cleaning, the mold could not be removed.

The witness further testified that over the 8 weeks after the initial flood, he communicated with the President of the Board and the managing agent in writing and verbally. The court admitted into evidence Plaintiff's Exhibit "3," a letter dated August 17, 2007, in which the Plaintiff notified Pamela DeLorme, as President of Dekalb Management, Inc., of the details of the flood on August 11, 2004 and subsequent conversations and communications on August 12, 2004 and August 17, 2004 regarding the flood and damages to his apartment. His letter was stated that he intended to assert a claim against the Graham Apartments, Inc., the managing agent and any vendors of the Defendant corporation based on their failure to "ensure that water from outside the building does not enter [his] unit and parked vehicle." "If you did not as of yet, it is essential that you make this claims known to all insurers immediately as per the probable policy terms and conditions as to protect coverage in this matter." (Plaintiff's Exhibit "3" in evidence.)

He further testified that it was Ms. DeLorme that indicated to him that they could not get in touch with him. The witness was befuddled by this alleged claim by the Board or the agent that they could not reach him because he had provided his contact information in the last paragraph of Plaintiff's Exhibit "3" which states his work number, beeper number, and an email address.

Subsequently, the witness had admitted into evidence Plaintiff's Exhibit "4," a letter dated September 13, 2014 to Ann Coraci, as President of the Board of the Defendant corporation, stating that numerous verbal requests have been made to her and to Dekalb Management for disclosure of the policy number and claim number of their insurance carrier. The Plaintiff claimed that the agent informed him that a claim for his property damages had been submitted to their insurance carrier. Although he had verbally notified the Defendant many times, this letter constituted a formal request of the name of the insurance carrier, the policy number, the date that they reported a claim, the contact number, address and the telephone number of the representative at the insurance company who was handling the claim. The letter also requests a reply in writing.

After some conversation with Ms. DeLorme, in December 2004, the Board had an inspection conducted of the subject apartment by Dr. Gilbert and his assistant. Dr. Gilbert and his assistant were at the apartment for 2-3 hours. The Plaintiff left while they conducted the inspection. The inspection confirmed that there was mold and other contaminates in the apartment. Subsequently, after the report was given to him and the Defendants, the witness stated that Ms. DeLorme agreed to have the environmental conditions rectified in the subject apartment. She allegedly stated that the Board would pay for the repairs including the removal of several feet of wall space above the floor to correct the mold condition and to replace the flooring. He claimed that she stated that the co-op, through its managing company, would be responsible for the repairs and he would be responsible for making arrangements to have his furniture and other personal property removed from the apartment during the cleanup process.

The witness further testified that he was relieved after he got the report that he was justified in not living in the apartment. According to the witness, Ms. DeLorme represented to him that the company that she hired to perform the remedial work was "A" rated and would do a good job. Subsequently, the witness testified that the report and the letter admitted into evidence as Plaintiff's Exhibit "5" was an agreement by the Board to complete the required repairs in the subject apartment. It is the opinion of this Court that Plaintiff's Exhibit "5" does not explicitly state that the work would be done or that there was a specific access date for the work to be done. The only statement in the letter that might be construed as language that such agreement could be implied by the Court is the final paragraph, which reads that "[t]he Board of Directors is now reviewing the tech cleanup proposal. Once this is resolved, I will coordinate the necessary work with you."

The witness testified that shortly thereafter, he starting making preparation for the removal of his furniture and other personal items, then he was indirectly informed that he had to speak to management about

the proposed cleanup. The Plaintiff testified that he immediately called the management company and spoke with Ms. DeLorme. He told her that he had hired a moving company and he was ready to go; he had packed his boxes and was informed that there was a problem. He said that she told him that the Board had changed its mind and that the cost of the proposal was too expensive. He also testified that he had a conversation with Ms. Coraci, the President of the Board, and she informed him that after a meeting, the Board stated that it was too expensive to restore the apartment to its pre-flood condition and that the Board determined that the mold condition was created by his own failure to allow access to the apartment immediately after the flood like the other shareholders.

On the following trial date of January 17, 2013, the case proceeded with a continuance of the direct examination of the Plaintiff. He testified that he submitted a claim to the Defendant's insurance company, "under a negligence theory, even though I am not a party to that insurance." (Gottesman-tr. at p. 5, lines 5-6; 1/17/2013). He testified that his claim was denied by GNY. Although his insurance company had denied the claim, the Plaintiff failed to submit a written declination from his insurance company in evidence; he just claimed that nothing ever happened. The GNY declination was provided by the Defendant, not the Plaintiff.

The witness further testified that after he vacated the apartment, he resided with his mother in his childhood room from the night of the flood on August 11, 2004 until he got married in or about June 28, 2010; at that time, he was 28 years old. He acknowledged that he never paid rent to his mother but " he helped her out here and there with expenses".

The witness further testified that at one point, he had to obtain another apartment and entered into a lease for that apartment which commenced on June 1, 2010 and terminated on May 31, 2011. Subsequently, he executed a lease renewal for the same apartment which commenced on June 1, 2011 and terminated on May 31, 2012. Mr. Gottesman stated that the reason why he had to get this apartment was that he was getting married, and he was not going to move his new wife into his mother's apartment.

He described the new apartment as an old apartment with 5 rooms and one bedroom. It was considered a "Jr. 4"- a small apartment. It was a considerably smaller apartment than his coop apartment and there were no real amenities with the new apartment. He liked the Graham apartment better; the new apartment was not really desirable; it was near Q train line, and there was lots of commercial traffic in the area. It was about 2 miles away from his coop apartment and located in the Midwood section of Brooklyn. Subsequently, the Plaintiff introduced into evidence Plaintiff's Exhibit "7" and "8," which were the lease agreements for the new apartment.

During this time period that he lived in the new apartment, he continued to pay the monthly maintenance, electric, natural gas, telephone lines and the mortgage at the Graham Apts.

The witness further testified that the monthly mortgage payments were automatically deducted from his account. The witness testified that he took a mortgage in the sum of $80,000.00 pursuant to a 15 year term at a fixed interest rate of 6 1/8%. Subsequently, Plaintiff's Exhibit "9" was admitted into evidence over objection; the Court specifically taking judicial notice of the ACRIS online City Registry pursuant to the New York Technology Law. Furthermore, Plaintiff's Exhibit "10A", a bank computer record of his mortgage interest, was admitted into evidence. The witness testified that the total amount of interest from August 11, 2004 to the date of trial was $24,404.15. (Gottesman- tr. at p. 34, lines 1-9: 1/17/2013).

As equally significant, despite the fact that there was a flood in the building in 2011 and the Plaintiff amended his complaint to add this new cause of action, he did not testify about this flood or proffer any evidence of exacerbated damages to his apartment for the alleged 2011 flood.

Furthermore, the Plaintiff admitted Plaintiff's Exhibit "12 A-J" that are photographs of the subject apartment in or about 2012. The witness stated although these photographs were taken in 2012, they fairly and accurately show the conditions from to 2005 through 2012. (Gottesman-tr. at p. 57, lines 1-8; 1/17/2013). As far as the witness was concerned, very little had changed. After the introduction of the aforementioned photographs into evidence, the Plaintiff rested his case-in-chief.

Prior to trial continuation on February 27, 2013, the parties stipulated and agreed to the admission of the report from Tech Clean Indoor Environmental Services as Defendant's Exhibit "F". To the Plaintiff's knowledge, the author of this report, Mr. Cofey, never inspected the apartment.

Mr. Gottesman then testified on cross-examination that he has a joint degree; a degree from John Jay College and a degree in forensic science. He obtained his degree between 2000-2005. He obtained a Master's Degree in public administration; and now holds a Juris Doctor. He obtained these degrees while he resided with his mother in her apartment.

He has been employed by the NYC Police Department since July 18, 1996. When he first started in the police force, he was a probationary police officer. Within three years, he was promoted from police officer to Sergeant after taking the Sergeant's test. Within four years, he took another competitive examination and became a Lieutenant. Then, he went on within another 4 year period and took a written test to became a Captain and now serves at that high rank.

He purchased the subject apartment in 2002. He stated that he inspected the apartment before he purchased it without the assistance of a home inspector or engineer, and also visited the building. During his ownership of the apartment, he never participated in any shareholder's meetings, reviewed any financial statements or met with the Board at any of their meetings. He also indicated that he never reviewed the financial statements or offering plan prior to closing, or reviewed the other corporate bylaws and amendments

before his purchase; neither did he know if his attorney reviewed the offering plan. He also acknowledged that he never tried to obtain a copy of the original lease or stock certificate.

The witness testified that he closed title in January 2002. He claimed that he, the bank representative and the seller were present at closing, but no one from the Board or managing agent was present. Additionally, he disclaimed any knowledge of the whereabouts of the original stock certificate and/or proprietary lease.

He further testified that the total co-op price was $100,000.00. He made a down payment of $20,000.00 and borrowed $80,000.00 from the bank to secure a mortgage for the subject premises. He acknowledged his signature on page 42 of Plaintiff's Exhibit "1".

He also stated that he commenced this action *pro se*. He conducted an EBT of some of the Defendants and represented himself at his own EBT. He also stated that he represented himself, *pro se*, from 2007 through and including 2010 and retained his present counsel at the trial stage of this action.

He testified that he had 2 locks on the front door of his apartment. He changed the top locks and stated that the bottom lock, a deadbolt lock, was never changed. He acknowledged that he never furnished the Graham Apts., their Board officers or their agents, the Managing agent, or superintendent, a key to the top or bottom lock to the apartment. He claimed that he had no knowledge that he was required to provide them with a key to his apartment.

The witness also testified that there was never any written notice from the Graham Apts. or its agents requesting access at any time.

The witness testified that despite the co-op's refusal to provide any relief for his apartment, he paid his maintenance from the date of the flood through 2011. He further testified that Plaintiff's Exhibit "5," in his opinion, was an acknowledgement by the Board that the work would be done at their expense; all he had to do was to coordinate the removal of his personal property.

The witness further testified that he suffered personal property damage in his apartment in the sum of $50,900.00 -$55,800.00. No evidence was presented to establish the value of the property loss.

He stated that he was denied his claim by both insurance carriers, but acknowledged that he did not bring any action against his insurance carrier or the Defendant's insurance carrier. He stated that the basis for their denial was that the insurance policy did not cover exterior flood damage or rain damage.

The witness further testified that he stopped paying the maintenance because he could no longer afford to pay the maintenance in the apartment and the mortgage at his new home.

He acknowledged that he took no remedial measures in the apartment. He admitted that the co-op did not tell him that he was prohibited from conducting any work himself. He, like the coop, stated that he did not have the money to complete the work. In addition, he also stated that he did not seek to borrow the money to restore the apartment or to remediate the conditions in the apartment.

On February 28, 2013, the witness continued his testimony. He told the Court that he never thought about doing the repairs himself. He also made no efforts to sell his apartment as a possible solution to his lack of funds to perform the repairs.

He acknowledged that he purchased a home in the amount of $937,000.00. He purchased it with two mortgages: $625,000.00 as a first mortgage and a second mortgage for $150,500.00 from an equity line of credit. The witness testified that he was still a shareholder, was current in his mortgage on the apartment, and current on his first and second mortgages on his home. He was delinquent with his maintenance payments as of the date of trial.

The Plaintiff states that he is making a claim for damages to his furniture but a claim for storage of the furniture. Despite this claim, the Plaintiff did not present any evidence of the damages or any estimate of the value of the damaged furniture.

On redirect, the witness testified that the co-op continued to refuse to provide him with information to obtain the name and policy number of the insurance carrier for the building.

He also claimed that he had to purchase a home because he had a growing family, two small sons. He claimed that due to his religious beliefs, he was restricted in where he lived. He was required to live near the Synagogue; he had to purchase a home in his community in order to exercise his religious freedom.

After he was excused, the Plaintiff next called Paul F. Blank as an expert. The witness testified as to his background. More pertinent for this decision, he was a contractor, primarily in Nassau County, where he renovated kitchens and bathrooms. As a contractor, he gave estimates for renovations by pricing out materials, labor and the number of hours to complete the work. Additionally, he has worked for various insurance companies including Progressive where he was involved in auto insurance; and for Allstate as a home adjuster where he estimated the loss in residential homes, assessed damages and reviewed vendor estimates on behalf of the company.

The witness testified that he has done estimates on fires, floods, sewer backups and pipe freezes. All insurance companies including but not limited to Liberty, Amica and Fireman's, all have standard estimates throughout the country and create estimates by the use of a computer program called Xactimate. This program relies upon zip codes and the cost of materials in the pertinent area. He further stated that while working for Allstate, he received training on water damage, remediation and mold remediation, and obtained a certificate for the training.

He further testified that he is an Adjuster. He has been involved in mold cleanup in commercial and residential properties over the last 8 to 9 years. He states that he had worked for Tech Clean Environmental Services in mold remediation for about 8 years. His other qualifications and certifications in toxicology and epidemiology, made him an expert in toxicology and epidemiology, and mold remediation.

The witness testified that Mr. Gottesman allowed him access to the apartment. He took measurements and made a visual assessment. Based on his inspection, the Plaintiff admitted into evidence Exhibit "13," his prepared report. The report recommended some demolition, protective gear from exposure to the mold, high frequency air filters and other type of filters. The witness further described that it would take 4 men each day for 5 days plus a supervisor to complete the removal of the damaged materials and to remediate the mold and other toxic materials. Specifically, he stated that the walls where the mold was "wicking" from the water damage was visible from the bottom of the baseboards to mid-wall, approximately 4-5 feet of the wall, required removal and replacement with new walls, the use of microbiological cleaners to remove the mold in the interior walls and stubs, and the use of an air borne filtration system to remove airborne mold. The total cost of this mold remediation is based on a local database for that particular area, and the price of materials and labor would cost approximately $31,352.24.

During cross-examination, the witness stated that he was able to base his costs solely on the information put into the Xactimate system. He further states that he was not paid for this report since he wanted the remedial work for his company. It took a couple of hours to complete the report and he appears in court to testify on behalf of the Plaintiff voluntarily at no costs; his hourly rate is $175.00 an hour. During his testimony, the witness acknowledge that the Xactimate program can be manipulated and the costs of each room could be higher or lower.

Next, the Plaintiff called Pamela DeLorme as his witness. Ms. DeLorme testified that she is the President of Dekalb Management and has been in that position since November 2001. The company is a real estate management firm and have managed this building for approximately 10 to 11 years

The witness testifies that there were 2 catch drains in the subject building and each had a run off from the New York City sewer system. The witness acknowledged that in 2000 and in August 2002, there were floods at the property but there was a dispute as to source of the floods. She specifically stated that, "I am aware that there was water due to the angle of the parking lot from the way the building is positioned, the catch basin filled with water, it didn't flood into the building but the parking lot, and that immediate area was filled with water at a depth of maybe 3 inches". The witness also testified after the flood of 2004, they discovered a second catch basin. In 2002, the catch basin filled with water which in turn flooded the parking lot with about 3 inches of water. In 2003, there was another heavy flood and the parking lot filled with water. (DeLorme tr. at p. 11, lines 1-25, p. 12, lines 1-25).

The witness acknowledged that after the 2002 and 2003 floods, they had a company by the name of Varsity Plumbing to investigate and find the source of the flooding. Varsity jet vacuumed, cleaned and removed debris from 3 storm catch basins from the building that poured into the NYC sewer system. In addition, the company made the following finding, to wit: "Found the main storm line from the last catch basin,

through to the city sewer connection, to be collapsed at approximately twenty-seven (27) feet. This line must be replaced. Will forward proposal concerning same." The Plaintiff admitted into evidence as Plaintiff's Exhibit "15," an invoice dated September 30, 2003, for the services to the other basins. As stated in the bill, the company submitted proposal Revision #1, dated **November 11, 2003** for the excavation of the defective pipes, installation of 30 linear feet of pipes to the property line and connection of the existing storm piping at a cost of $29,200.00. Included also in Plaintiff's Exhibit 15 is the executed Revision #2 for the same scope of work dated **June 28, 2006** in the sum of $35,624.00 that was executed by the parties on July 6, 2006. Lastly, as part of Plaintiff's Exhibit 15 is a paid bill dated **October 30, 2006** for the work stated above that was performed by Varsity from October 23, 2006-October 27, 2006 in the sum of $44,568.14. The bill states that the aforementioned sum was paid by check no: 11119 on November 17, 2006. (***Emphasis added***).

The witness acknowledged that she had received the proposal and scope of work prior to the August 2004 flood event in controversy in this action. Although the witness acknowledged that prior to 2003, the Board of Directors was notified of the deficient condition by Varsity Plumbing, from her memory, she remembered that the repairs were not performed until July, 2006. Her testimony belies the dates stated in Plaintiff's Exhibit "15" which states on the paid bill that the repairs were performed between October 23, 2006-October 27, 2006.

The witness also acknowledged that she was in receipt of the letter, dated August 17, 2004, from Mr. Gottesman notifying her office of the flood in his apartment.

The witness did not know whether or not Mr. Gottesman performed any repairs to his apartment. Her memory, she said, was not clear after 8 or 9 years had passed since the incident. Notwithstanding the questions by the Plaintiff's attorney, the witness's recollection was pretty clear that Mr. Gottesman simply locked the door and walked away.

The witness also acknowledged that she did not provide the Plaintiff with the information for the insurance carrier for the building because it was a policy of the Board of Directors to not release that information to the shareholders. The Board of Directors did retain the company that she recommended to inspect the apartment and she did send the Plaintiff a copy of the report and the estimate of the remediation work. The report was apparently also forwarded to the Board.

Subsequently, the Board met to discuss the facts and the report, and then decided not to perform any of the remedial work in the apartment. Although they did not see Mr. Gottesman in the property, they were aware that he was picking up the mail. They did, in fact, send notices to him but claim he was unreachable. As far as the witness was concerned, notwithstanding the efforts to contact Mr. Gottesman, in her opinion, he had abandoned the apartment.

When asked about her ability to communicate with Mr. Gottesman, she indicated that notwithstanding the fact that Mr. Gottesman had provided two numbers for her to contact him, they were never able to reach him. When the flood first occurred, they left messages at the police station seeking access to no avail. She would often leave messages at the police station and was informed that he wasn't there and to leave messages for him.

The witness further testified that notwithstanding the above report, the Defendant did not clean the apartment. The witness further testified that it was the intention of the Board to clean up the apartment after the flood occurred, but they could not get access. She stated that members of the Board spoke to Mr. Gottesman, knocked on his door and left messages under his door the same day or the day after the flood when they had the other apartments cleaned that were flooded on the first floor. Despite the claims that there were notices placed on the Plaintiff's door, the witness acknowledged that they did not have any copy of the notices to the Plaintiff since it was more than 8 years ago.

The witness testified that the water penetrated the walls and heating system. She was firm that based on the fact that water had entered the apartment from outside, the Board and her company did not consider it "an emergency". Thus, they would have never entered his apartment without his consent. Leaks from the inside of the building were considered "emergencies". Although the witness testified that the Board could impose a special assessment to perform the work, the Board did not elect that remedy under the proprietary lease.

Additionally, on cross-examination, the witness acknowledged a letter, dated March 22, 2005, admitted as Exhibit "G", was written by her. In her letter to the Plaintiff, Ms. DeLorme affirmed the Board's position that it was his fault that the apartment was contaminated with mold; the letter stated "...it is the position of the Board that you permitted the mold condition to grow. If you had not vacated your apartment and cleaned up the water correctly, this condition would never have existed."

Exhibit "F", the report from Tech Cleans, the cost for the remedial work as of January 21, 2005 was $9,750.00. The costs today would be double or triple that price due to the deterioration of the apartment.

The witness further testified that at least as far back as 2005, Mr. Gottesman never retained anyone to repair the apartment.

On redirect, the witness further confirmed that the other apartments that were cleaned by the Graham Apartments were done by the superintendent who used a wet vacuum and cleaned the floor and walls. When asked by the court why the Board of Directors did not clean the Plaintiff's apartment, the witness stated that, "because the Board of Directors felt he locked the door and walked away, and wouldn't have gotten to that point if he had just simply let it be cleaned up when the other two apartments were cleaned up. The other two apartments had water on the floor and walls. They dried up the apartments and wet vacuum everything right away the following morning. Since they did not have access to his apartment, they could not do the work. They

had tried to do it at different times but especially the Board President put notices under his door, and he didn't respond, so we felt he just abandoned the apartment, and that's why." (DeLorme, tr. at p. 46, lines 24-25; p. 47, lines 1-21: 2/27/2013).

On February 27, 2013, Ann Coraci, a member of the Board of the Defendant corporation, was called by the Plaintiff as his witness. She testified that she has lived in the subject building since April 10, 2001. She became a Board member three years later and in August 2004, she was a witness to the flood in the building. She further testified that three apartments were flooded. She went inside the subject apartment. She states that she never received Plaintiff's Exhibit "4", the letter from the Plaintiff. She indicated that the Plaintiff only verbally notified her regarding the flood in the apartment. She indicated that two of the other apartments were cleaned up by the building, but in Mr. Gottesman's case, he left the property and never came back. He never even asked the Board to clean up the apartment, as far as she was concerned.

She also testified that no one entered the apartment after the flood except for Tech Clean who entered years later to assess the damages. She acknowledged that she smelled mold on the date of the flood and continues to smell mold in the apartment from the outside door of the apartment.

On cross-examination, the witness revealed that she was born August 29, 1928 and that her memory was not that good. However, the witness recalled that there were three apartments that were affected by the flood on the first floor. Despite her memory loss, she was adamant that she had never received the letter from Mr. Gottesman about the flood. She only remembered that he called her on the telephone and said that he called her a couple of times. When asked whether or not there was a point that they had someone go into the apartment and check for mold, she said, "no, he just left and never came back." (Coraci, tr. at p. 7, lines 1-7:2/27/2013).

On the adjourned date of March 15, 2013, the Plaintiff rested. There was some dispute over Defendant's Exhibit F. The Defendant reserved the right to call Veronica Kero, and the case was adjourned until April 23, 2013.

On April 23, 2013, the Defendant moved for a directed verdict. The Defendant contends that the Plaintiff failed to prove any of the claims in the summons and complaint including the covenant of quiet enjoyment and breach of the warranty of habitability. In addition, the Defendant moved to dismiss the breach of contract claims. The Defendant denies liability for the breach of the warranty of habitability based on the grounds that the Plaintiff abandoned the subject apartment.

The court reserved decision and directed the Defendant to proceed with its case-in-chief.

The Defendant called Veronica Kero, from Omega Environmental Services, Inc. Mrs. Kero has a Masters in Environmental Engineering. She has been a professor of engineering in both New York State and New Jersey. She is a certified industrial national hygienist. She is a graduate from Rutgers College and has had training at the New Jersey Institute. She has been a certified engineer for more than 20 years from 1989 until

now. She specializes in environmental health and safety, and mold and indoor air quality. She has testified in court many times: 15 times in New York and 15 times in New Jersey. She is employed by Omega Environment; a company that conducts environmental consulting inspections, and lead testing and chemical testing of any air borne and water pollutants. She has been involved in hospitals, homes and in Hurricane Sandy projects. The Defendant's motion to qualify her as an expert was granted. In addition to the above, her resume was submitted to the Plaintiff pursuant CPLR§3101(d).

Her company was employed as an environmentalist to inspect the apartment. Defendant's Exhibit "H", a 38 page report that summarized the finding of mold on the hard surfaces and in the air was admitted into evidence. She opined that mold progressed based on excessive humidity in the apartment. The tests show that all areas of the apartment required mold remediation and abatement. The witness testified that if the remedial work had been done within at least 24 hours after the flood, it would have cost less than $5,000.00. However, to the perform the work now, it would cost in excess of $36,288.00 including clearance testing.

The witness further testified, on cross-examination, that Xactimate provides an industry standard for prices. She testified that the mold remediation work would take 2 to 3 weeks based on multiple factors. She further testified that her report and findings were in conformity with Tech Clean's report; but, the real different is the scope, not the layout of the project. She testified that there is no certain way to truly know the cost of supplies and that there is no guarantee on the price for remedial work. She did claim that Tech Clean's report was too detailed and overpriced. In her opinion, her company's plan was less expensive, and would involve coordinating the rebuild plan. She also indicated that price depends upon the contractor that was obtained by the parties and the price would be based upon unit price, labor and other factors.

At the conclusion of this testimony and a waiver of any rebuttal by the Plaintiff, both parties rested. The case was marked *sub judice*.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In the case at bar, Plaintiff's "2," the proprietary lease and the mortgage and promissory note establishes, as a matter of law, that the parties have mutual contractual obligations.

Paragraph 2 of the proprietary lease, entitled Lessor's repairs provides, in pertinent part, that the Lessor shall, at its expense, keep in good repair all of the Building including all of the Apartments, the sidewalks and courts surrounding the property,...and its equipment and apparatus, except those portions the maintenance and repair of which are expressly stated to be the responsibility of the Lessee pursuant to paragraph 18 hereof.

Paragraph 3 entitled Services by Lessor, states that the Lessor shall maintain and manage the building as a first-class apartment building....and shall provide ....for proper case and services of the building and shall

provide the apartment with proper and sufficient supply of heat and cold water. It shall be the discretion of the Board to determine from time to time what services...shall be proper and manner of services. According to the lease, there shall be no diminution or abatement of rent or other compensation to the Lessee for the failure of the Lessor to perform...for interruption or curtainment of services...when such failure...shall be due to....required alternations or repairs..."

As equally important, if the apartment or the building shall be damaged by fire or other cause covered by the multi-peril policy commonly carried by the cooperative corporation in New York City, the Lessor shall, at its own cost and expense, the reasonable dispatch after receipt of notice of said damage, repair or replace or cause to be repaired or replaced with materials of a kind and quality then customary in the building of the type of the building, the apartment and means of access thereto including the walls, floors, ceilings, pipes, wiring and conduits in the apartment. Interestingly, the lease goes on to state in paragraph 4a as follows, "...anything in this paragraph or paragraph 2 to the contrary, Lessor shall not be required to repair or replace, or cause to be repaired or replaced, equipment, fixtures, furniture, furnishings or decorations installed by the Lessee or any of his or her predecessors in title nor shall the Lessor be obligated to repaint or replace wallpaper or other decorations in the apartment or to refurnish or refinish floors located therein."

As equally pertinent, in paragraph 4b, the lease agreement provides "in case the damage resulting from fire or other cause shall be so extensive as to render the apartment partially or wholly untenable, or if the means or access thereto shall be destroyed, **the rent hereunder shall proportionately abate until the apartment shall again be rendered wholly tenable or the means of access restored; but if said damage shall be caused by the act or negligence of the Lessee or the agents, employees, guests, roommates or family members of the Lessee or any occupant of the apartment, such rental shall abate only to the extent of the rental value insurance, if any, collected by Lessor with respect to the apartment."**

Additionally, in paragraph 10, it provides that "the Lessee, upon paying the rent and performing the covenant in complying with the conditions on the part of the Lessee to be performed, as hereinafter set forth, shall, at all times during the term hereby granted, quietly have, hold and enjoy the apartment without any let, suit, trouble or hindrance from a Lessor, subject however to the rights of present tenants in occupancy or occupants of the apartment, and subject to any and all mortgages and underlying leases of the land and building or any portion thereto."

On the other hand, in provision 18a, which describes repairs by the Lessee, the provision provides as follows "...the Lessee shall take possession of and the Lessee accepts the apartment and its appurtenances and fixtures in its 'as is' condition and state of repair as of the commencement of the term hereof. Subject to provisions in paragraph 4, the Lessee shall be solely responsible for the painting and decorating required for his or her apartment including the interior of the window frames, sashes and sills and shall be solely responsible for

the maintenance and the repairs of the interior of the apartment...and shall be responsible for the maintenance, repair, and replacement of plumbing, lighting, gas, electrical and heating fixtures and equipment and such refrigerators, dishwashers, removable or through the wall air conditioners, washing machines, ranges and other appliances that may be in the apartment. Plumbing, gas, and heating fixtures...shall include exposed gas, steam, and water pipes attached to fixtures, appliances, appliances and equipment which they are attached...but shall not include gas, steam, water and other pipes or conduits within the walls, ceilings or floors or air conditionings or heating units which is part of the standard building equipment..."

Paragraph 25a provides that the Lessor, or it's agents and employees and their authorized workmanship be permitted to visit, examine or enter the apartment and any storage space assigned to Lessee at any reasonable hour of the day upon notice...additionally, paragraph 25b states that ...in order that the Lessor shall at all times have access to the apartment or storage room for the purposes provided for in this lease, the Lessee shall provide the Lessor with **a key** to each lock providing access to the apartment or the storage room and if the locks shall be altered or a new lock installed, the Lessee shall provide the Lessor with a key thereto immediately upon installation. If the Lessee shall not be personally present to open and permit an entry at any time when an entry thereon shall be necessary or permissible thereunder and shall not have furnished a key to Lessor, the Lessor or Lessor's agents...may forcibly enter the apartment or storage area without liability for damage by reason thereto...and without in any manner affecting the obligations and covenants of this lease.

Pursuant to paragraph 29a, "the Lessor shall not be liable, except by reasons of Lessor's negligence, for (i) any failure or insufficiency of heat, water, supply, electric current, telephone, elevator, gas or other services to be provided by the Lessor hereunder, (ii) interference for light, air, view or other interest of the Lessee or (iii) damage to personal property caused by the elements or by another tenant, shareholder or person in the building or resulting from steam, gas, electricity, water, rain or snow which may leak or flow from outside or from any part of the building or from any other pipes, drains, conduits, radiators, boilers, tanks, appliances or equipment or from any other place. The Lessor or its agents shall not be responsible for any damage to any automobile or other vehicle left in the care of any employee of the Lessor by the Lessee or a member of Lessee's family and the Lessee shall hold the Lessor and its agents harmless from any liability arising from any injury to person or property caused by or with such automobile or other vehicle while in the care of such employee...unless due to Lessor's negligence, no abatement of rent or any other compensation or claim of eviction shall be made or allowed if accidents, alterations, or repairs or strike, difficulties or delay in securing supplies or labor or any other cause beyond Lessor's control, causes (i) the making or failure to make or delay in making any repairs, alterations or decorations to the building, or any fixtures or appurtenances thereto, or (ii) the taking of the space to comply within the law, ordinance or government regulation, or (iii) the interrupting or curtailing of any services agreed to be furnished by the Lessor.

FIRST CAUSE OF ACTION FOR NEGLIGENCE

As described above, the Plaintiff alleges that the Defendant's negligence was the cause in fact of the damages that he sustained to his personal and 'real' property, that is, the destruction of the subject apartment. The common law and pertinent state statutes must be examined to determine if the Plaintiff has a cause of action and has proven the elements of those causes of action as stated in his complaint and his testimonial evidence.

The documentary evidence and testimonial evidence reveal that there are several theories of law that are applicable in this case. Specifically, negligence, comparative negligence, waste, the breach of the warranty of habitability and breach of contract.

The common law defines negligence simply as the lack of ordinary care. "It is a failure to use that degree of care that a reasonably prudent person would have used under the same circumstances. Negligence may arise from doing an act that a reasonably prudent person would not have done under the same circumstances; or, on the other hand, from failing to do an act that a reasonably prudent person would have done under the same circumstances". (Pattern Jury Instruction 2.10.) The commentaries to this section of the PJI states that negligence is relative to time, place, circumstances and persons, and what may be negligence to one person may not be negligence to another. (Levine v New York, 309 NY 88, 127 NE2d 825 (1955); Sadowski v Long Island R. Co., 292 NY 448, 55 NE2d 497 (1944).

The Court of Appeals has stated it another way, "negligence is defined as the commission of some lawful act in a careless manner, or the omission to perform some legal duty to the injury of another. Nicholson v. The Erie R., 41 N.Y. 525.

Under existing legal principles, the determination of liability based on negligence requires a four-tier analysis. The traditional elements require that there be: 1) a duty or obligation recognized by law, requiring the party to conform to a certain standard of conduct, for the protection of others against unreasonable risks. If there is no duty owed, there can be no liability. Cullings v. Goetz, 256 N.Y. 287, 176 N.E. 397); 2) a breach by the party of that specific duty; 3) a reasonable close causal connection between the conduct and the resulting injury, commonly referred to as legal or proximate cause; and 4) actual damage or loss to another. Nicholson v. The Erie R., *supra*, Prosser on Torts, 4th Ed. pg. 143.

Now looking more closely to the individual elements stated above, "the standard of care, that is, due care under the circumstances, is inflexible, but the degree of caution required to be exercised in specific situations to comply with such standard of care varies with the time, place and conditions involved, and with the risk reasonably to be apprehended" (Akins v Glens Falls City School Dist., 53 NY2d 325, 441 NYS2d 644, 424

NE2d 531 (1981); Havas v Victory Paper Stock Co., Inc., 49 NY2d 381, 426 NYS2d 233, 402 NE2d 1136 (1980); Quinlan v Cecchini, 41 NY2d 686, 394 NYS2d 872, 363 NE2d 578 (1977); Nicholson v Board of Educ. of City of New York, 36 NY2d 798, 369 NYS2d 703, 330 NE2d 651 (1975); Caldwell v Island Park, 304 NY 268, 107 NE2d 441 (1952); Martinez v Lazaroff, 66 AD2d 874, 411 NYS2d 955 (2d Dept 1978), *aff'd*, 48 NY2d 819, 424 NYS2d 126, 399 NE2d 1148 (1979)". Stated this way, it is axiomatic that we must "identify what people may reasonably expect of one another and define the boundaries of "duty" that one must comport with what is socially, culturally and economically acceptable" (Darby v Compagnie National Air France, *supra.*); *see also* Sheila C. v Povich, 11 AD3d 120, 781 NYS2d 342 (1st Dept 2004).

The pivotal question in negligence cases is whether the alleged tortfeasor owed a duty of care to the injured party. (Espinal v Melville Snow Contractors, Inc., 98 NY2d 136, 746 NYS2d 120, 773 NE2d 485 (2002); *see* Landon v Kroll Laboratory Specialists, Inc., 22 NY3d 1, 977 NYS2d 676, 999 NE2d 1121 (2013); Church ex rel. Smith v Callanan Industries, Inc., 99 NY2d 104, 752 NYS2d 254, 782 NE2d 50 (2002); Sheila C. v Povich, 11 AD3d 120, 781 NYS2d 342 (1st Dept 2004). "Negligence arises from a breach of [that] legal duty (Strauss v Belle Realty Co., 65 NY2d 399, 492 NYS2d 555, 482 NE2d 34 (1985); Pulka v Edelman, 40 NY2d 781, 390 NYS2d 393, 358 NE2d 1019 (1976); Levine v New York, 309 NY 88, 127 NE2d 825 (1955); Palsgraf v Long Island R. Co., 248 NY 339, 162 NE 99 (1928), and is not actionable unless it results in damage to a person to whom the legal duty is owed (Levine v New York, *supra*; Schmidt v Merchants Despatch Transp. Co., 270 NY 287, 200 NE 824 (1936); Larmore v Crown Point Iron Co., 101 NY 391, 4 NE 752 (1886)".

The question of fact as to whether defendant owes a duty of care to plaintiff "is entirely one of law to be determined by the courts," Donohue v Copiague Union Free School District, 64 AD2d 29, 407 NYS2d 874 (2d Dept 1978), aff'd, 47 NY2d 440, 418 NYS2d 375, 391 NE2d 1352 (1979); Gerdowsky v Crain's New York Business, 188 AD2d 93, 593 NYS2d 514 (1st Dept 1993); *see* Ohlhausen v New York, 73 AD3d 89, 898 NYS2d 120 (1st Dept 2010); Matthews v Scotia-Glenville School System, 94 AD2d 912, 463 NYS2d 629 (3d Dept 1983); Crosby v Bethlehem, 90 AD2d 134, 457 NYS2d 618 (3d Dept 1982) (town owed no duty to pedestrian for failure to arrest intoxicated motorcyclist); Conte v Aeolian Corp., 80 AD2d 990, 437 NYS2d 473 (4th Dept 1981).

In jury trials, it is within the province of the jury to determine whether and to what extent a particular duty was breached; it is for the Courts to determine whether any duty exists, Espinal v Melville Snow Contractors, Inc., 98 NY2d 136, 746 NYS2d 120, 773 NE2d 485 (2002); Darby v Compagnie National Air France, 96 NY2d 343, 728 NYS2d 731, 753 NE2d 160 (2001); Hamilton v Beretta U.S.A. Corp., 96 NY2d 222, 727 NYS2d 7, 750 NE2d 1055 (2001).

The issue regarding the proper role of foreseeability has long been a subject of debate. The PJI cites Ohlhausen v New York, 73 AD3d 89, 898 NYS2d 120 (1st Dept 2010) for a long discussion of the

foreseeability issue. *See also* Eiseman v State, 70 NY2d 175, 518 NYS2d 608, 511 NE2d 1128 (1987) ("[f]oreseeability of injury does not determine the existence of duty"); 532 Madison Ave. Gourmet Foods, Inc. v Finlandia Center, Inc., 96 NY2d 280, 727 NYS2d 49, 750 NE2d 1097 (2001) ("foreseeability of harm does not define duty"); Lauer v New York, 95 NY2d 95, 711 NYS2d 112, 733 NE2d 184 (2000) ("[w]ithout a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm"); Bonomonte v New York, 79 AD3d 515, 914 NYS2d 19 (1st Dept 2010), aff'd, 17 NY3d 866, 932 NYS2d 421, 956 NE2d 1266 (2011), and Sheila C. v Povich, 11 AD3d 120, 781 NYS2d 342 (1st Dept 2004) (foreseeability "does not determine the existence of duty, but rather, the scope of that duty once it is determined to exist"). At least one court has observed in light of the foregoing cases that the Cardozo position in Palsgraf "may have undergone some adjustment," Ohlhausen v New York, *supra*.

Lastly, the issue of whether a defendant's negligence was the proximate cause of an injury is separate and distinct from the negligence determination, Ohdan v New York, 268 AD2d 86, 706 NYS2d 419 (1st Dept 2000). "A defendant may act negligently without that negligence constituting a proximate cause of the injury". "In order to find that defendant's negligence was a proximate cause of the harm caused to plaintiff, the jury must find that the negligence was a substantial factor in bringing about the injury (citing PJI). For a discussion of the issue of proximate cause, see PJI 2:70.

Viewing the instant case in the context of the above-mentioned principles, this Court must answer the following questions: 1) was there a duty owed by the Defendant to the Plaintiff? 2) was the duty breached? 3) was the breach of that duty the proximate cause of Plaintiff's injury? and 4) did the Plaintiff, in fact, suffer actual damage or loss?

When the above general negligence principles are applied to landlord and tenant cases, the first question must be resolved in accordance with the well settled proposition of law that a landlord owes a duty to the tenants to exercise reasonable care. Basso v. Miller, 40 N.Y.2d 233, 386 N.Y.S.2d 564, 352 N.E.2d 868; Curry v. New York City Housing Authority, 77 A.D.2d 534, 430 N.Y.S.2d 305. The duty of reasonable care has been construed to limit the legal responsibility of the defendant/landlord to those damages which it reasonably could have foreseen to be within the scope of the risk created by his act or omission, i.e., the reasonable foreseeability of the risk. Alebrande v. New York City Housing Authority, 44 Misc.2d 803, 254 N.Y.S.2d 326; *citing*, Palsgraf v. Long Island Railroad, 248 N.Y. 339, 162 N.E. 99. Further, the High Court has held that any uncertainty as to the amount of damages will not preclude recovery. Wakeman v. Wheeler and Wilson Mfg. Co., 101 N.Y. 205, 4 N.E. 264. As stated in Alebrande, *supra*, 254 N.Y.S.2d at 331, "mathematical certitude is unnecessary, the only requisite being a reasonable basis for the computation of approximate damages" (citing, Eastman Kodak Co. v. Southern Photo Material Co., 273 U.S. 359, 379, 47 S.Ct. 400, 405, 71 L.Ed. 684; Duane Jones Co., Inc. v. Burke, 306 N.Y. 172, 192, 117 N.E.2d 237; Mills Studio v. Chenango Valley Realty Corp., 15

A.D.2d 138, 221 N.Y.S.2d 684; Slater v. Kane, 275 App.Div. 648, 92 N.Y.S.2d 640; 15 Am.Jur. Damages, Sec. 21, pp. 412–413; Restatement, Contracts, Sec. 331). *See also* Prager v. City of New York Housing Authority, 112 Misc.2d 1034, 447 N.Y.S.2d 1013.

Lastly, in one of oldest decisions in this area, Lake v. Dye, 232 N.Y. 209, 133 N.E. 448, the Court of Appeals found that a reasonable basis for computing the value of household goods was the real value to the owner and not the market value. Thus, a plaintiff should be allowed to recover the value to her based on her actual monetary loss, "all the circumstances and conditions considered". Based upon the foregoing, the court opined that plaintiff has sustained her burden of proving actual damages with some degree of exactness under all the circumstances of this case. Haughey v. Belmont Quadrangle Drilling Corp., 284 N.Y. 136, 29 N.E.2d 649.

In the case at bar, Plaintiff's 2, the proprietary lease, and the mortgage and promissory note establishes as a matter of law that the parties have mutual contractual obligations and thus a legal and factual mutual duty. The above paragraphs, namely, ¶2 (Lessor's repairs), ¶3 (Services by Lessor), ¶4b (Damage to Apartment or Building), ¶10 (Quiet Enjoyment), ¶18a-d (Repairs by Lessee), ¶19 (Lessor's Right to remedy the Lessee's defaults) and ¶24 (cooperation) establish that the Defendants has a contractual duty to the Plaintiff to exercise reasonable care in the management and operation of the building to protect all of the shareholder-tenants against the unreasonable risk of floods into the building and their respective apartments. As demonstrated in Plaintiff's Exhibit "15," in a bill, dated September 30, 2003, under index number 76870, labeled job number 39640, the Defendant had actual notice from Varsity Plumbing and Heating, Inc. that it's inspection revealed that "...the main storm line from the last catch basin, through to the city sewer connection, to be collapsed at approximately 27 feet. This line must be replaced." This bill with its finding demonstrates that on September 30, 2003 the Defendants had actual knowledge and notice of a dangerous condition at the subject premises and had an affirmative duty to correct that condition immediately or suffer the consequences of its failure to abate the condition, thus, breaching their contractual obligation to the Plaintiff and other residents of the building. Based upon the failure of the cooperative to correct the condition within a reasonable time after due notice, the Defendant breached the above named covenant to maintain the property in a safe and habitable condition.

Based on the above analysis, the first two prongs of the four elements of negligence has been proven by the Plaintiff.

Notwithstanding the lack of evidence submitted by the Plaintiff to substantiate the manner in which the water penetrated the rear of the building or even permeated the front of the property, this Court can nonetheless conclude that the failure to correct this condition was the proximate cause of the infiltration of water into the building. But for the broken 27 feet of pipe in the rear of the building, the water would not have accumulated in

the rear causing the increase in water levels which in turn caused at least one foot of water to settle near and on the rear walls of the building and flow into the front of the property. The Bill, dated September 30, 2003, and the subsequent proposal on November 11, 2003 where the aforementioned company recommended the scope and cost of the sewer repairs in the sum of $29,200.00 constitutes sufficient evidence to create a reasonably close causal connection between the failure of the co-op to replace this piping and the resulting flooding conditions in the rear of the property and in the front of the property causing the damage to the subject apartment and other apartments.

Additionally, this court found credible the testimony of the Plaintiff that he observed one foot of water in the rear of the building and then saw water on the floor in his apartment which entered from the front of the building. The Defendant did not submit any evidence to refute this testimonial evidence. Both Ann Coraci and another member of the Board were present on the date that the flood occurred on August 11, 2004, and Ms. Coraci's testimony did not rebut the claims made by the Plaintiff that the water entered his apartment through either one or both of these external sources. Further, as Ms. Coraci and Mrs. DeLorme both attested to at trial, it was determined that the source of the infiltration was exterior since both testified to the fact that it was contrary to Board policy to enter into another shareholders' apartment when leaks are from external as opposed to internal sources.

The last element required to substantiate the Plaintiff's claim of negligence would be the actual damage or loss as the result of the failure of the Defendants to correct the condition stated in Plaintiff's Exhibit "15." The Court deems Plaintiff's Exhibit 15 an admission of actual knowledge of the condition by the Graham Apts. that the Board did not correct and the broken rear pipes was the cause in fact of the flood water entering the Plaintiff's apartment as a matter of fact and law.

Based upon the foregoing, the court finds that the Defendant breached its contractual duty to the Plaintiff by failing to exercise reasonable care in failing to take prudent and reasonable precautions to protect the subject premises from water accumulation by the immediate correction of the deficient 27 feet of catch basin piping. Had the Defendant repaired the condition within a reasonable time, the unreasonable risk of harm of the accumulation of excess rain water from any source would not have occurred and the Plaintiff would not have suffered any damages.

Nonetheless, the Court has searched the record and finds no evidence of the value in any form of property damages. As provided above, the Court of Appeals found that a reasonable basis for computing the value of household goods was the real value to the owner and not the market value, thus, allowing the plaintiff to recover the value to him based on his actual monetary loss. Although the Plaintiff submitted photographs of the conditions of the apartment including the furniture, the record is devoid of any monetary sum claimed by the Plaintiff. The Plaintiff testified that he was damaged between $50.900.00-$55,800.00. This range claimed by the

Plaintiff is speculative and does not constitute sufficient actual monetary loss for this Court to award any sums for property damage; the Court is left to speculate as to whether that included clothing, furniture, rugs, flooring, or the value of the damages to the apartment or the remedial work. The record is unclear. The Plaintiff failed to give any detail in his testimony with any degree of exactness or certainty under the circumstances of this case and the Court is constrained to deny any relief for damages. Haughey v. Belmont Quadrangle Drilling Corp., 284 N.Y. 136, 29 N.E.2d 649.

WASTE

"Waste"' in its simplest definition, is whatever does lasting damage to real property. Voluntary waste (sometimes called commissive waste) consists of a deliberate or voluntary act which injures the premises; for instance, destroying a house, or the removal of oak paneling, floors, benches, furnaces, windows, doors, shelves, or other things fixed to and constituting a material part of the property. On the other hand, Permissive waste consists of the negligent or willful omission to do what is required to prevent an injury to the demised premises. For example, the failure to make such ordinary repairs as are necessary to prevent waste and decay of premises, that is, tenantable repairs, will constitute permissive waste. Rasch, Landlord and Tenant Law, §19:2 (4th ed., update 2014).

It is well settled that a tenant must not do anything which constitutes waste. It is the duty of a tenant to exercise ordinary care in the use of the demised property, and not to cause any material and permanent injury thereto, over and above, ordinary wear and tear. For any injury resulting from a tenant's wrongful acts or his failure to exercise such care, a tenant is liable to the landlord in damages. A tenant has an implied obligation to refrain from affirmative acts of waste and to make "tenantable" repairs to avoid permissive waste of the leasehold (*see,* Suydam v. Jackson, 54 N.Y. 450; Marcy v. City of Syracuse, 199 A.D. 246, 255–256, 192 N.Y.S. 674; 199 A.D. 246, 255–256, 192 N.Y.S. 674; *see generally,* 34 N.Y.Jur., Landlord and Tenant, § 479; 17 Carmody–Wait 2d, N.Y.Prac. § 107:8). Since a covenant to repair includes and is construed in light of the tenant's common-law obligation to repair (*see* Marcy v. City of Syracuse, *supra*, at 256, 192 N.Y.S. 674), there is no incompatibility between claims alleging waste and breach of a lease or covenant to repair.

A claim for waste sounds in tort and may be brought by one, such as a reversion or remainderman, who is not in a landlord-tenant relationship and whose rights do not depend upon a lease (RPAPL 801, 811, 831; *see generally,* 17 Carmody–Wait 2d, N.Y.Prac. §§ 107:5, 107:12, 107:20; 63 N.Y.Jur., Waste, §§ 10–24 [rev. ed.]).

Thus, a decision not to make repairs would be considered permissive waste, even though unintentional, because no act occurs.

For our purposes, NY Courts have also noted that the length of a lease is a relevant factor in determining

a lessee's repair obligations. In a long-term net lease, the tenant has the absolute obligation to repair, whereas in a short-term lease, the tenant's obligation is comparatively less. S*ee generally,* 34 N.Y.Jur., Landlord and Tenant, § 479; 17 Carmody–Wait 2d, N.Y.Prac. § 107:8).

The ultimate question of whether particular acts or omissions constitute waste depends to a great extent on the facts including: the nature, purpose, and duration of the tenancy; the custom of the neighborhood; the character of the property; whether the acts complained of are related to the use and enjoyment of the property; whether the use is reasonable under the circumstances; and whether the acts complained of are reasonably necessary to effectuate such use. S*ee generally,* 34 N.Y.Jur., Landlord and Tenant, § 479; 17 Carmody–Wait 2d, N.Y.Prac. § 107:8).

It is irrefutable that the flood to the subject premises occurred on August 11, 2004. The Plaintiff acknowledged that from the date of the flood he has not occupied the subject premises.

When asked what efforts he used to remove the flood waters from his apartment, the Plaintiff admitted that his efforts were ineffective. He stated that "it was almost silly. There was so much water. It was a futile attempt to soak up all the water with what I had." (Gottesman-tr. at p. 63, lines 22-24). It was even apparent to him that he did not use the proper methods to correct or to remove the water from his apartment. It is the duty of the tenant to exercise ordinary care in the use of the premises and not to cause any material or permanent injury thereto except ordinary wear and tear. The Court finds that the Plaintiff did not use such ordinary care by his use of bath towels, a sponge mop, ceiling fans, window fans, and the Damp Rid products to remove the water and moisture from the subject apartment. The amount of water that entered into the apartment required more effective and effective measures. The use of these tools in a futile attempt to remove gallons of water from the apartment does not comport with the "duty" that one must comport with in what is socially, culturally and economically acceptable" under the facts in this case (Darby v Compagnie National Air France, *supra.*); *see also* Sheila C. v Povich, 11 AD3d 120, 781 NYS2d 342 (1st Dept 2004).

The Plaintiff also stated during his testimony that after 8 weeks, the Damp Rid products were no longer effective in removing the moisture from the apartment. Certainly at that time, the Plaintiff should have known that he should take some other affirmative action to remediate the conditions in the apartment. The Plaintiff had an express contractual obligation to refrain from negligible acts of waste and to make tenable repairs to avoid permissive waste in the apartment.

This is a 99 year lease where the Plaintiff has a nondelegable duty and obligation to maintain and to repair his apartment under the circumstances. The Plaintiff had the affirmative obligation under his mortgage and lease not to permit waste and not to allow the apartment to deteriorate into complete disrepair and/or uninhabitability. As a long-term net lease, as provided in aforementioned paragraphs, ¶2, (Repairs by Lessee),

¶18-a-d (Repairs by Lessee) and ¶24 (cooperation) and his mortgage, the Plaintiff had an absolute obligation to repair the apartment and not to allow the apartment to deteriorate like it did.

This Court is of the opinion that the decision not to use a wet vacuum and/or water removal company to properly remove the water immediately after this home remedy failed to remove the moisture constitutes permissive waste.

Notwithstanding the Plaintiff's claims that he notified the Defendant in writing of the ways in which to communicate with him for access to the apartment, the primary responsibility for the maintenance and repair of this apartment was on the Plaintiff and not the Defendant. The Plaintiff had a duty to act immediately to remedy the conditions in the apartment, after the products stopped working and even more compelling, certainly after due notice by the Board President that the Board had not approved the remedial work in the apartment, particularly since the Board determined that it was due to his neglect. The Court finds that after their determination that the Plaintiff was the cause in fact of the conditions in the apartment by his failure to allow access to correct the conditions after the flood like the other shareholders on the first floor, it was even more imperative that the Plaintiff act immediately to preserve the apartment to escape claims of waste. Even if he had given the Board a key, in accordance with his contractually obligations (see paragraph above), the Board may have been able to have the apartment wet vacuumed, like the others. The Plaintiff acknowledge that he did not give the Board a key, notwithstanding his claims that he had no knowledge of his contractual obligations, is no excuse-thus, the old adage that "ignorance of the law is no excuse" is certainly applicable here.

Furthermore, this Court is also of the opinion that once the insurance carriers determined that the occurrence was not a "covered event", the burden then shifted to the Plaintiff pursuant to paragraph 2, (Repairs by Lessee), ¶18-a-d (Repairs by Lessee) and ¶24 (cooperation), to correct the conditions. Once the conditions were corrected by the Plaintiff, the Plaintiff had the option to recover the sums paid for the remedial work from the Board in two manners: withhold maintenance, thus, putting the burden on the Board to commence nonpayment proceedings against him in which he could assert related counterclaims as allowed by the NYC Civil Court Act §208 or to commence a separate legal action to recover the sums paid for the remedial work and any incidental and/or consequences for said damages. However, the Plaintiff never lived in the apartment after that date or made any efforts to remediate the conditions in the apartment thereby causing the apartment to deteriorate to and including up to the date of trial in this action. The time span from August 11, 2004 to the date of trial is in excess of 9 years, which this Court deems to be an unreasonable period of time for the apartment to languish in total disrepair.

An ordinary individual using ordinary care would not have abandoned the apartment after a flood of this nature. An ordinary and prudent person would have made some concerted efforts to remediate the conditions to this apartment. No ordinary tenant would have just left their apartment and never returned. Most people in this

great city would not have had any option but to "stay and pay". Just because the Plaintiff had several options, including moving back into his mother's apartment or getting a new apartment, did not give him a right to unreasonably abandon the apartment to escape the responsibility of restoration of the apartment to its pre-flood condition. Although the Court found the Plaintiff' testimony trustworthy and credible, his inactions were unreasonable and imprudent.

Based upon the above facts and evidence, the court finds that the Plaintiff committed permissive waste and as demonstrated below is not entitled to the full recovery as demanded in this action.

COMPARATIVE NEGLIGENCE

In many jurisdictions including New York, the doctrine of contributory negligence, which at common law completely bars recovery, has been supplanted by the statutory rule of comparative negligence. The comparative negligence statute is intended to eliminate the "all or nothing" effect of the common-law doctrine of contributory negligence by allowing an apportionment of fault and damages. The practical effect is that the amount of damages otherwise recoverable by the Plaintiff is diminished in the proportion to the culpable conduct attributable to the Plaintiff and how that bears on the culpable conduct that caused the damages.

In any action to recover damages for personal injury, injury to property, or wrongful death, the contributing culpable conduct attributable to the claimant or decedent will not completely bar recovery, unless the plaintiff's conduct constitutes express assumption of the risk, primary assumption of the risk, or is the sole proximate cause or a superseding cause of the injuries. Am. Jur. 2d, Negligence § 955.

N.Y. C.P.L.R.§ 1411, the comparative negligence statute, adopts the "pure" form of comparative negligence. A plaintiff can recover a proportionate share of the damages even if his or herown negligence is greater than that of the defendant. Under this "pure" or complete comparative fault provision, plaintiff's recovery might range from 1% to 100% of the judgment or verdict. NY Prac., NY Law of Torts, §21:129; CPLR 1411, discussed at N.Y. Jur. 2d, Negligence § 98.

Actions to which the statute applies are those, regardless of theory, "to recover damages for personal injury, injury to property or wrongful death," CPLR 1411, including claims of plaintiffs who are themselves guilty of an intentional wrong, Lomonte v A & P Food Stores, 107 Misc2d 88, 438 NYS2d 54 (App Term 1981), unless that conduct rises to the level of "a serious violation of the law" as in Manning by Manning v Brown, 91 NY2d 116, 667 NYS2d 336, 689 NE2d 1382 (1997) (plaintiff injured while knowingly participating in unauthorized use of motor vehicle); Barker v Kallash, 63 NY2d 19, 479 NYS2d 201, 468 NE2d 39 (1984) (plaintiff injured while constructing a "pipe bomb"); Moore v Suffolk, 11 AD3d 591, 783 NYS2d 72 (2d Dept 2004) (plaintiff injured while resisting arrest); LaPage v Smith, 166 AD2d 831, 563 NYS2d 174 (3d Dept

1990); *see* Soto v New York City Transit Authority, 6 NY3d 487, 813 NYS2d 701, 846 NE2d 1211 (2006) (plaintiff entitled to recover from defendant for its percentage of fault even though he acted recklessly in running along catwalk adjacent to subway tracks, while intoxicated, in effort to catch train); Alami v Volkswagen of America, Inc., 97 NY2d 281, 739 NYS2d 867, 766 NE2d 574 (2002) (plaintiff successfully opposed summary judgment, even though decedent was intoxicated at time of auto accident, by arguing that design defect enhanced decedent's injuries); *see also* Rokitka v Barrett, 303 AD2d 983, 757 NYS2d 184 (4th Dept 2003) (violation of Penal Law § 265.05 [unlawful possession of weapon by person under sixteen] would not bar plaintiffs' suit when illegal possession not direct cause of injury).

Comparative negligence is an affirmative defense; and must be pled and proved by the defendant. It is an affirmative defense (sometimes called "comparative causation"), whether intentional or willful misconduct, gross negligence or a breach of statute or contract. "Thus, it embraces any action based on breach of duty, whether through negligence, through breach of warranty or predicated upon strict liability, upon a violation of statute giving rise to civil liability or upon intentional misconduct, 1975 McKinney's Session Laws, 1482, 1483–1484, 1486. However, "neither comparative negligence nor contributory negligence is a defense to an action based on a statute imposing absolute liability, Giuffrida v Citibank Corp., 100 NY2d 72, 760 NYS2d 397, 790 NE2d 772 (2003); Mullen v Zoebe, Inc., 86 NY2d 135, 630 NYS2d 269, 654 NE2d 90 (1995) (comparative negligence no defense to an action by firefighter under General Municipal Law § 205-a); Bland v Manocherian, 66 NY2d 452, 497 NYS2d 880, 488 NE2d 810 (1985) and Zimmer v Chemung County Performing Arts, Inc., 65 NY2d 513, 493 NYS2d 102, 482 NE2d 898 (1985) (both holding that comparative negligence is no defense to an action by injured employee under Labor Law § 240); Dubois v Vanderwalker, 245 AD2d 758, 665 NYS2d 460 (3d Dept 1997) (comparative negligence no defense to action by police officer under General Municipal Law § 205-e)".

The defense of culpable conduct applies to both strict products liability and negligence cases. NY Prac., NY Law of Torts, §21:129; *see* also C.P.L.R. §1412; Tselebis v Ryder Truck Rental, Inc., 72 AD3d 198, 895 NYS2d 389 (1st Dept 2010); Gonzalez v Medina, 69 AD2d 14, 417 NYS2d 953 (1st Dept 1979); *see* Inglut v Consolidated Rail Corp., 185 AD2d 614, 586 NYS2d 41 (4th Dept 1992).

In the Second Department, a plaintiff has not made out a prima facie showing of entitlement to judgment as a matter of law on the issue of defendant's liability unless plaintiff's submissions eliminate any triable issue of fact concerning plaintiff's comparative negligence, Mackenzie v New York, 81 AD3d 699, 916 NYS2d 511 (2d Dept 2011); Roman v A1 Limousine, Inc., 76 AD3d 552, 907 NYS2d 251 (2d Dept 2010); but see Yi Min Feng v Jin Won Oh, 71 AD3d 879, 895 NYS2d 856 (2d Dept 2010). In the First Department, most of the relevant case law supports the principle that a plaintiff may obtain summary judgment as to defendant's liability even though open questions exist about plaintiff's own negligence, Pace v Robinson, 88 AD3d 530, 930 NYS2d

581 (1st Dept 2011); Gonzalez v Arc Interior Const., 83 AD3d 418, 921 NYS2d 33 (1st Dept 2011); Strauss v Billig, 78 AD3d 415, 909 NYS2d 724 (1st Dept 2010); Tselebis v Ryder Truck Rental, Inc., *supra*; see Johnson v New York City Transit Authority, 88 AD3d 321, 929 NYS2d 215 (1st Dept 2011). However, in subsequent cases, that court has declined to follow Tselebis and its progeny, and has embraced the approach taken by the Second Department, Maniscalco v New York City Transit Authority, 95 AD3d 510, 943 NYS2d 486 (1st Dept 2012); Calcano v Rodriguez, 91 AD3d 468, 936 NYS2d 185 (1st Dept 2012).

Based on the above facts, the Court finds that both parties were negligent in their actions(s) with regard to handing the flood in the subject apartment and building.

The Defendant was negligent to the extent that the Defendant failed to use ordinary care to protect the Plaintiff and other building members from the unreasonable risk of harm to the Plaintiff and other occupants from water damage by the failure to correct the deficient condition of the sewer pipes that was determined by their independent contractor. It was highly probable that there would be heavy rains during the rainy seasons on the eastern coast of this country, specifically, in the fall and in the spring. Heavy rains have relentlessly permeated NYC in the more recent past, particularly, Hurricane Sandy, which clearly demonstrated that flooding is not uncommon in New York City.

As to the Plaintiff, contrary to the terms of his proprietary lease and the terms and conditions of his mortgage, he was negligent in his failure to reasonably maintain the apartment and all appurtenances thereto, by allowing the apartment to fall in disrepair. The Court, having already determined that the failure of the Plaintiff to exercise reasonable care in the commencement of remedial work in the subject apartment after the flood constitutes permissive waste and in this case, the Court finds that the Plaintiff's permissive waste is *negligence per se* insomuch that the failure to maintain the subject premises in good condition is a violation of his contractual obligations and state law.

The Court further finds that the Defendants have sustained their claims the answer, specifically in the first separate and complete defense, namely under paragraphs 37 and 38 of the amended verified answer, that the Plaintiff's culpable conduct, if any damages are determined recoverable against the Defendant, should be diminished in proportion to the culpable conduct attributed to the Plaintiff bears to the culpable conduct, if any, of said Defendants. It is the opinion of this Court that the Defendant has sustained its burden of proof of comparative negligence by the Plaintiff. This finding is supported by the determination of this Court that the Plaintiff committed permissive waste in his failure to undertake remedial work within a reasonable period of time after the declination of the insurance carriers to cover the claim and by the determination of the Board of Directors that the repairs would not be performed by the Graham Apts. to the subject premises.

Moreover, the Plaintiff admitted that he never participated in any manner with the building or its occupants. The Plaintiff did in fact abandon the apartment. He had other remedies that he carelessly ignored

causing the damages to this apartment. The mold in this apartment not only effected this apartment but may, in fact, have affected other apartments. The Plaintiff was obligated to act and should have corrected the conditions in the apartment or the Plaintiff may find himself in litigation with other occupants or the Board for his breach of contract and comparative negligence in this matter.

For the reasons stated above, the Court finds, based on the testimonial and documentary evidence at trial, the percentage of negligence attributed to the Plaintiff is 80% and the sum attributed to the Defendant is 20%.

BREACH OF THE WARRANTY OF HABITABILITY

A landlord's warranty of habitability to his tenant is a contractual promise that the rented premises will be safe and habitable. The implied warranty of habitability is a recent development in American and New York law (see 1 American Law of Property (Casner ed.), s 3.79; 2 Powell, Real Property, par. 225, subd. (2); Humbach, Landlord Control of Tenant Behavior, 45 Fordham L.Rev. 223 (1976)). At common law, there was no warranty of habitability implied in the landlord-tenant relationship, and the principle of caveat emptor applied to all contracts for the leasing of real or personal property as well as to contracts of sale (O'Brien v. Capwell, 59 Barb. 497 (1870); Edwards v. N. Y. & H.R.R. Co., 98 N.Y. 245 (1885) (per Earl, J.); Franklin v. Brown, 118 N.Y. 110 (1889) (per Vann, J.)). Absent fraud or a contractual obligation, the landlord neither promises that the premises are tenantable nor that he is obliged to keep the property in a safe, habitable state (Witty v. Matthews, 52 N.Y. 512 (1873); Jaffe v. Harteau, 56 N.Y. 398 (1874); Franklin v. Brown, *supra*).

The common law doctrine of caveat lessee, which dates from the origins of English common law, was abrogated by the Appellate Division, Second Department, in Tonnetti v. Penati, 48 A.D.2d 25, 367 N.Y.S.2d 804 (1975). Prior to the Tonnetti decision, however, the doctrine of caveat lessee was not applied by some lower courts in summary proceedings for the nonpayment of rent, and an implied warranty of habitability was found and applied.

In the Tonnetti opinion, *supra*, Justice Shapiro wrote: "The doctrine of implied warranty of habitability has been the accepted policy of many of the judges of the Civil Court of the City of New York for a number of years" (Groner v. Lakeview Management Co., 83 Misc.2d 932, 373 N.Y.S.2d 807, 808 (N.Y.C.Civ.Ct., N.Y. County (1975); *see, e. g.,* Jackson v. Rivera, 65 Misc.2d 468, 318 N.Y.S.2d 7 (N.Y.C.Civ.Ct., N.Y. County 1971); Morbeth Realty Corp. v. Velez, 73 Misc.2d 996, 343 N.Y.S.2d 406 (N.Y.C.Civ.Ct., N.Y. County, 1973); Steinberg v.

Carreras, 74 Misc.2d 32, 344 N.Y.S.2d 136 (N.Y.C.Civ.Ct., N.Y. County, 1973))." "Since 'the law, as a living organism, does not require that the dead hand of the past perpetuate remediable errors' . . . we relegate to the limb of history the orthodox view of caveat lessee and hold that, unless expressly excepted, there is an implied warranty of habitability when a landlord leases premises for residential use'." (48 A.D.2d at 30, 367 N.Y.S.2d at 808.)" Tonnetti v. Penati, *supra*, was decided on May 12, 1975, and shortly thereafter the Legislature enacted a statutory warranty of habitability which is implied into every New York residential lease (L.1975, ch. 597, eff. 8/1/75). The statute, Real Property Law, section 235-b, was subsequently amended in 1976 so as to add a third subdivision (L.1976, ch. 837, eff. 7/26/76).

The first leading decision on the warranty of habitability and the new statute was Park West Management Corp. v. Mitchell, 47 N.Y.2d 316, 418 N.Y.S.2d 310, 391 N.E.2d 1288 (1979). This was one of the first cases in which the Court of Appeals discussed the statute. Chief Judge Cooke, in a well-written opinion, traced the history of the warranty of habitability and placed it within a modern framework when he stated that "[t]he modern-day tenant, unlike his medieval counterpart, is primarily interested in shelter and shelter related services. He is usually not competent to perform maintenance chores, even assuming ability to gain access to the necessary equipment and to areas within the exclusive control of the landlord . . . . Since a lease is more akin to a purchase of shelter and services rather than a conveyance of an estate, the law of sales with its implied warranty of fitness (Uniform Commercial Code, s 2-314) provides a ready analogy that is better suited than the outdated law of property to determine the respective obligations of landlord and tenant" (Green v. Superior Ct., 10 Cal.3d 616, 626-627, 111 Cal.Rptr. 704, 517 P.2d 1168) (citation omitted). (47 N.Y.2d at p. 324, 418 N.Y.S. at p. 314, 391 N.E.2d at p. 1292.)

In the Park West Management case, *supra,* the warranty was used defensively by a tenant on behalf of about four hundred co-tenants in a Manhattan apartment house complex. The owner sued in a summary proceeding for the nonpayment of rent. The court found that the buildings' maintenance and janitorial employees' strike caused the premises to be uninhabitable and that the implied warranty of habitability was breached. The court found that: "The scope of the warranty includes, of course, conditions caused by both latent and patent defects existing at the inception and throughout the tenancy. However, as the statute places an unqualified obligation on the landlord to keep the premises habitable, conditions occasioned by ordinary deterioration, work stoppages by employees, acts of third parties or natural disaster are within the scope of the warranty as well . . . . inasmuch as the landlord is vested with the ultimate control and

responsibility for the building, it is he who has a corresponding nondelegable and nonwaivable duty to maintain it" (*citation omitted*). 47 N.Y.2d at p. 327, 418 N.Y.S.2d at p. 316, 391 N.E.2d at p. 1294.)

In Park West Management (*supra*), the court granted the respondents a rent abatement and did not restrict the remedies available for the breach of the warranty to only a rent abatement. The court discussed the rent abatement as a remedy under the particular facts of that case only, and chose not to comment on the availability of other remedies in other situations, such as in the instant case, which involves property damage. The recovery covers both latent and patent defects. The fact that the damages may not be readily ascertainable will not shield a landlord from liability.

Courts have sustained the use of Real Property Laws 235-b as both a shield in a summary proceeding for the nonpayment of rent and as a sword in a counterclaim or in a plenary action. The warranty has been used in tort actions for both personal injuries (Kaplan v. Coulston, *supra*) and property damage (McBride v. 218 E. 70th St. Associates, *supra*). In no case has a court refused recovery for property damage, and there is nothing in the legislative history which indicates that damages are to be limited to a rent abatement. "Breach of implied warranty is generally treated as a form of strict liability where most of the difficult problems of proof in a negligence action are obviated (Guyot v. Al Charyn, Inc., 69 A.D.2d 79, 87, 417 N.Y.S.2d 941 (1st Dept. 1979), citing 47 N.Y.Jur., Products Liability, s 66)".

The breach of the implied warranty of habitability had already been pleaded in cases other than summary proceedings for the non-payment of rent before the Park West Management decision (*supra*) (*See*, e. g., Groner v. Lakeview Management Corp., *supra*). *See also* Kaplan v. Coulston, 85 Misc.2d 745, 381 N.Y.S.2d 634 (N.Y.C.Civ.Ct., Bronx County, 1976), a kitchen cabinet fell on the tenant, and subsequently, commenced an action for her personal injuries. The court adopted the theory of strict liability on the part of the landlord for personal injuries caused by a defect in the premises. This decision did not eliminate the burden of the plaintiff to prove the defect(s) in the premises; it did, however, eliminate the difficulty of proving negligence.

This approach has not been adopted by all courts, although many people involved in a plaintiff's personal injury action based on defects in real property would welcome this approach (*See* Lipsig, Breach of Implied Warranty of Habitability in Residential Leases, NYLJ, October 30, 1979, p. 1, col. 1).

In many other cases resolved by summary judgment or bench trials decided after Park West Management, the Courts have awarded tenants money damages rather than rent abatements

(*See* Goodman v. Ramirez, 100 Misc.2d 881, 420 N.Y.S.2d 185 (N.Y.C.Civ.Ct., Bronx County, 1979) (damages for "disruption of daily living"); Sargent Realty Corp. v. Vizzini, 101 Misc.2d 763, 421 N.Y.S.2d 963 (N.Y.C.Civ.Ct., N.Y.County, 1979) (damages for flooding caused by neighboring tenants); H & R. Bernstein v. Barrett, 101 Misc.2d 611, 421 N.Y.S.2d 511 (N.Y.C.Civ.Ct., Bronx County, 1979) (damages for lack of water due to the acts of third parties). *See also* Blatt v. Fishkin, 101 Misc.2d 888, 422 N.Y.S.2d 283 (N.Y.C.Civ.Ct., Kings County, 1979) (cause of action for "adverse impact on life"); Brownstein v. Edison, 425 N.Y.S.2d 773 (Sup.Ct., Kings County, 1980) (complaint amended to permit action for breach of the implied warranty of habitability). Cf., Concord Village Management Co. v. Rubin, 101 Misc.2d 625, 421 N.Y.S.2d 811 (Dist.Ct., Suffolk County, 1979).)"

In a recent Appellate Term, First Department case, nearly on point with the action at bar, McBride v. 218 E. 70 St. Associates (102 Misc.2d 279, 425 N.Y.S.2d 910 (1979)), the tenant sued her landlord for property damage resulting from eight floods. The apartment was flooded with six inches of water. The plaintiff moved for summary judgment on her cause of action based on the breach of implied warranty of habitability. The Appellate Term ruled that the motion should be granted as to the issue of liability but ordered an assessment of damages. The court found that this tenant did not cause the flooding or contribute to it. More importantly, the Court ruled that there need not be a showing that the landlord acted in bad faith or contributed to the defective condition of the premises. The court seemingly approved the reasoning of Kaplan v. Coulston (*supra*), and it cited it with approval.

The warranty of habitability applies to both tenants and the owners of cooperative apartments [*see e.g.*, Suarez v. Rivercross Tenants' Corp., 107 Misc.2d 135, 438 N.Y.S.2d 164 (1981)] but not to condominium owners [*see e.g.*, Frisch, *supra*] and can be used affirmatively as herein [see e.g., McGuinness v. Jakubiak, 106 Misc.2d 317, 321, 431 N.Y.S.2d 755, 757 (1980) ("this warranty may be used affirmatively in a cause of action for property damage")] or as a defense in landlord's action seeking unpaid rent [*see e.g.*, Kachian v. Aronson, 123 Misc.2d 743, 475 N.Y.S.2d 214 (1984) (fifteen percent (15%) rent abatement)].

Water damage caused by leaking ceilings and roofs has been the subject of considerable litigation between tenants and landlords [*see e.g.*, Walling v. Holman, 858 F.2d 79 (2nd Cir.1988), *cert. denied,* 489 U.S. 1082, 109 S.Ct. 1537, 103 L.Ed.2d 842 (1989) (water damage to tenant's parquet floor is recoverable under Real Property Law § 235–b); Frisch v. Bellmarc Management, Inc., 190 A.D.2d 383, 597 N.Y.S.2d 962 (1993) (roof leaks); Couri v. Westchester Country Club, 186 A.D.2d 712, 589 N.Y.S.2d 491 (1992) (constant water damage); Ameri v.

Diane Young Skincare Center, Inc., 170 A.D.2d 280, 565 N.Y.S.2d 810 (1991) (tenant clothing store awarded $187,639.00 for water damage to merchandise); Halkedis v. Two East End Avenue Apartment Corp., 161 A.D.2d 281, 555 N.Y.S.2d 54 (1990) (leaking roof; tenant fails to prove damages); Minjak Co., v. Randolph, 140 A.D.2d 245, 528 N.Y.S.2d 554 (1988) (tenants who suffered 40 separate leaks from health spa on floor above awarded rent abatement, attorneys' fees of $5,000.00 and punitive damages of $5,000.00); Vanderhoff v. Casler, 91 A.D.2d 49, 458 N.Y.S.2d 289 (1983) (faulty plumbing); Kachian v. Aronson, 123 Misc.2d 743, 475 N.Y.S.2d 214 (1984) (water damage; rent abatement awarded); McGuinness v. Jakubiak, 106 Misc.2d 317, 431 N.Y.S.2d 755 (1980) (flooding during rainstorm dumps six inches of water onto apartment floors); McBride v. 218 East 70th Street Associates, 102 Misc.2d 279, 425 N.Y.S.2d 910 (1979) (tenants suffered damages from eight separate floods); Blatt v. Fishkin, 101 Misc.2d 888, 422 N.Y.S.2d 283, 284 (1979) (roof leaks have an "adverse impact on ... life"); Sargent Realty Corp. v. Vizzini, 101 Misc.2d 763, 421 N.Y.S.2d 963 (1979) (upstairs tenants cause four floods; rent abatement awarded); Goodman v. Ramirez, 100 Misc.2d 881, 420 N.Y.S.2d 185, 186 (1979) (leaky toilets; tenants awarded $400.00 for "disruption of daily living")].

In the case at bar, the Court finds that the Defendant, Graham Apts., breached the warranty of habitability by the failure to correct the sewer pipes after due notice. See annexed Abatement Chart.

The Defendant is 100% liable from the date of the flood which occurred on August 11, 2004 to March 30, 2005 and thus, the Plaintiff is entitled to a 100% abatement during this time period (the date of the flood to the date that the Plaintiff was informed that the Defendant would not correct the mold condition in the apartment).

After the Plaintiff was notified that the Board would not pay for the mold remediation, the apportionment of liability and the percentage of the warranty of habitability from April 1, 2005 to October 31, 2006, is 80% for the Plaintiff and 20% for the Defendant. The above chart represents the amount of the monthly maintenance as stated in Plaintiff's Exhibit "1" and percentages.

As set forth above, the total rent abatement that the Plaintiff is entitled to is $7,554.11, which represents all claims for the breach of warranty of habitability from the inception of the flood on August 11, 2004 through and including October 31, 2006.

BREACH OF CONTRACT

Based on the above assessment, the Court also finds that the Plaintiff has sustained his claims of a breach of contract by the Defendant. The Court finds that the failure of the Defendant to correct the 27 feet of pipe on due notice is a breach of the contractual obligations of the Defendant as clearly expressed in paragraph 2 (Lessor's repairs) and ¶3 (Services by the Lessor) of the proprietary lease. The Managing Agent did not state that the building was in financial difficulty or did not have the ability to borrow the necessary funds to pay for the required repairs as of the date of notice by Varsity on September 30, 2003. Thus, from the date that the Plaintiff and Managing agent had notice of the condition on September 30, 2003 until the date that the condition was corrected between October 23, 2006-October 27, 2006, the Court will award damages for breach of contract in the sum of $4082.69 (the total amount of rent paid by the Plaintiff from October 1, 2003 to October 31, 2006 (37 months) for a total of $20, 413. 46 times 20% (the percentage of Defendant's liability).

After the correction of the condition on October 30, 2006, the Court further finds that the Plaintiff's culpable conduct is 100% for the mold and other toxic deterioration of the subject premises and the Plaintiff is not entitled to the recovery of any claims for the breach of warranty of habitability or breach of contract after October 31, 2006 to the date of trial.

DAMAGES

The total sum that the Plaintiff seeks in reimbursement for the rental of the Midwood apartment is $34,220.00. Based on the above facts, the Plaintiff is not entitled to the recovery of the sums paid for the new apartment; the rental value of the lease agreements admitted into evidence as Plaintiff's Exhibit "7 and "8". The Plaintiff did not rent this new apartment due to the mold and other contaminates in the apartment. Instead, the new apartment was rented by the Plaintiff because he was getting married and he did not want to have his wife live with him in his old childhood room at his mother's apartment. In fact, his fiancé, Rebecca Fried, was a co-tenant on the leases for the new apartment.

Additionally, the Plaintiff stated that he relocated to his new one family dwelling because of the exercise of his religion and the increase of his family size. Therefore, the Plaintiff did not prove entitlement to a refund of the rental amounts paid for the two years that the couple occupied the new apartment.

The Court must deny any claims for property damages. The Plaintiff testified that he was damaged in the sum of $52,000.00-55,660.00 for property damage. There were no estimates of the cost of replacement or receipts for the value of any of the property in the apartment or the value of replacing or repairing damaged carpeting, bedding, and clothing. Although the Courts are liberal in the required proof to substantiate the defect(s) in the premises, some evidence, other than generalized statements of property loss, is needed to prove

property damages. The final question is whether the Plaintiff's generalized testimony as to the approximate value of his household goods is sufficient to form the basis for the determination of his damages. The Court answer is in the negative. In this case, like Park West Management and its progeny, this Court will award the Plaintiff a rent abatement and not money damages under the facts here. Since the Plaintiff did not even pay for alternative housing because he lived rent free with his mother and presented no evidence of his property loss, a rent abatement for the reduction in the value of the apartment is more appropriate.

Additionally, the Plaintiff is not entitled to the recovery of any mortgage interest as claimed in the summons and complaint and as shown in Plaintiff's Exhibit "10A" and "10B". The Court cannot allow the Plaintiff to "double dip." The Plaintiff stated on the witness stand that he reduced his taxable income by the deduction of the yearly mortgage interest on his federal income tax returns for the time period in question. To permit him to obtain any reduction for this amount in this case would be tantamount to allowing him to "double dip". It took legislative amendments to the Rent Stabilization Law and Code in 1997 to end these "double dipping" rights of rent regulated tenants. Once upon a time, rent regulated tenants were awarded rent abatements in court and had the right to obtain rent reductions pursuant to individual apartment improvements in rent regulated buildings for the identical reduction in services. The same theory for preventing double dipping is applicable in this action. Thus, the Court denies all claims by the Plaintiff for recovery of the interest on his mortgage, and this claim is dismissed with prejudice.

As to the other claims stated in the amended complaint regarding the May 2011 flood, neither party presented any either real or testimonial evidence about this alleged occurrence. The generalized statements about the May 2011 flood in the amended complaint were not proven in any manner and are insufficient to substantiate any further damages to the apartment. Thus, this claim is without merit and is dismissed with prejudice.

The Plaintiff is not entitled to an order to correct or 'injunctive relief' (not applicable in the Civil Court except in certain instances not applicable to this case) based on the finding by the court that the Plaintiff's conduct constituted waste and he was contributory negligent for the deterioration of the subject apartment.

The Court has reviewed and assessed the other causes of action in the summons and complaint and finds those contentions to lack merit. The Plaintiff did not substantiate those claims, namely, private nuisance, trespass, and breach of the covenant of quiet enjoyment and accordingly those claims are dismissed with prejudice.

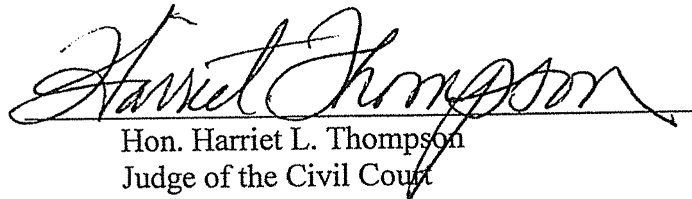
Accordingly, the Clerk of the Court is directed to enter judgment in favor of the Plaintiff against the Defendant, the Graham Apartment, Inc. in the sum of $11,636.80 with interest from October 1, 2003, together with costs and disbursement of this action. The Court declines to enter judgment against the Managing Agent, DeKalb Management, based on the analysis above and finds no vicarious liability for the aforesaid judgment.

A courtesy copy of this Decision and Order shall be sent to the attorney for the respective the parties. The Plaintiff shall serve a copy of this Decision and Order with the above named Judgment with Notice of Entry within 30 days from the entry of said Judgment by the Clerk of the Court and shall file proof of service thereto with the Clerk of the Court.

Both parties may retrieve their evidence from the chambers of the undersigned by appearing at the 7th Floor Security Desk and instructions shall be given to the parties to retrieve their evidence and to acknowledge receipt thereof on a form to be provided by the Court.

This constitutes the Decision and Order of this court.

Dated: April 5, 2015



Hon. Harriet L. Thompson
Judge of the Civil Court

ABATEMENT CHART

Maintenance Dates	Monthly Maintenance	Total
9/1/2004 – 3/30/2005	$698.70	$4,890.90 (Board liable for 100%)
4/1/2005 – 6/30/2005	$698.70	$2,096.10
7/1/2005 – 1/31/2006	$735.52	$5,148.64
2/1/2006 – 6/30/2006	$625.84	$3,129.20
7/1/2006 – 10/31/2006	$735.52	$2,942.08
TOTAL		$13,316.02 (4/1/05-10/31/06)

$13,316.02 x 20% (Board liability) = $2,663.21

+

$4,890.90

=

Total Abatement $7,554.11