

**SUPREME COURT FOR THE STATE OF NEW YORK
NEW YORK COUNTY**

In re Gateway Plaza Residents Litigation

Index No. 651023/2014

*[Consolidated with:
Index No. 651030/2014]*

**CONSOLIDATED THIRD
AMENDED CLASS ACTION
COMPLAINT**

PRELIMINARY STATEMENT

Plaintiff Maureen Koetz (“Plaintiff”), by and through [his/her] undersigned counsel, brings this Consolidated Second Amended Class Action Complaint seeking damages against the Defendant Marina Tower Associates, L.P. (“Marina Tower” or “Defendant”) and alleges upon knowledge, information, and/or belief, as follows:

1. This is an action seeking damages and injunctive relief for violations of Section 235-b of the New York Real Property Law, and breach of contract.
2. Defendant, as owner, ground lessee, landlord, and/or manager of the property located at 345, 355, 365, 375, 385, and 395 South End Ave, New York, New York, commonly referred to as “Gateway Plaza” (“Gateway Plaza” or the “Property”), has failed to maintain residential apartment units (“Apartments”) fit for human habitation.
3. Specifically, the Apartments owned, let, and/or managed by the Defendant contain structural and other defects involving windows, insulation, and with electric, through-wall Packaged Terminal Air Conditioning (“PTAC”) units that have caused and continue to cause uninhabitable temperatures in the Apartments, including extremely frigid conditions during the

winter months and excessively hot conditions in the summer months, as well as other structural and environmental hazards, including structural deterioration and fungal growth.

4. As a result of the structural defects outlined above, Plaintiff and members of the Class are required to use excessive amounts of electricity. In fact, during the winter months, Plaintiff and members of the Class must resort to supplemental heat through portable heaters and the like. Similarly, in the summer months, Plaintiff and members of the Class are forced to run their air conditioning units constantly to maintain a tolerable temperature. Such usage results in Plaintiff and members of the Class having to incur exorbitant utility charges that are grossly disproportionate to those at comparable buildings in New York City.

5. In addition, because Defendant purchases electricity directly from Con Edison and then resells it to tenants through Gateway Plaza's sub-metering system, collecting additional fees in the process, Plaintiff and members of the Class are forced to pay even more than they would have had the electricity been delivered directly from Con Edison.

6. This class action seeks damages in the form of, *inter alia*, rent abatements, relief from the overpayment of utility costs, and injunctive relief to remedy the building defects described herein.

7. By failing to maintain habitable conditions, Defendant has violated the warranty of habitability set by New York Real Property Law § 235-b.

PARTIES

8. Plaintiff Maureen Koetz was, at times relevant to the claims herein, a residential tenant at Gateway Plaza. Ms. Koetz currently is a former tenant of Gateway Plaza.

9. Defendant Marina Tower is a domestic limited partnership organized and operating pursuant to the laws of the State of New York and is the ground lessee of a group of Gateway Plaza and landlord of the Plaintiff and members of the Class..

CLASS ALLEGATIONS

10. Plaintiff brings this class action pursuant to Article 9 of the New York Civil Practice Law and Rules (“CPLR”) on behalf of all Gateway Plaza residential tenants from April 1, 2008 to the present (the “Class”).

11. The Class is so numerous that joinder of all members is impracticable. As noted herein, Gateway Plaza has more than 1,700 Apartments.

12. The disposition of the claims in a class action will be of benefit to the parties and to the Court.

13. There are questions of law and fact common to the Class, including: (1) whether Defendant has breached the warranty of habitability; (2) whether the breach of the warranty of habitability has resulted in the overpayment of rent and electrical utilities and to what extent; (3) whether members of the Class are entitled to rent abatements and rent refunds due to Defendant’s failure to remedy the defects; (4) whether members of the Class are otherwise entitled to a refund of any rent increases or other charges incurred due to Defendant’s purported attempts to fix the defects giving rise to this action; (5) whether members of the Class are entitled to injunctive relief to remedy the ongoing breach of warranty of habitability; (6) whether members of the Class are entitled to reimbursement of excessive electrical charges incurred due to Defendant’s failure to remedy the defects; and (7) whether members of the Class are entitled to injunctive relief to remedy the excessive charges related electrical consumption.

14. Plaintiff will fairly and adequately protect the interests of the Class.

15. Plaintiff is a member of the Class and is committed to prosecuting this action.
16. Plaintiff has retained competent counsel experienced in litigation of this nature.
17. Plaintiff's claims are typical of the claims of other members of the proposed Class in that Plaintiff seeks damages based on overpayment of electrical charges and other related damages.
18. Defendant has acted or refused to act on grounds that apply generally to the Class, so that final judgment is appropriate respecting the Class as a whole.

FACTUAL ALLEGATIONS

19. Gateway Plaza was completed in 1984 and is comprised of six buildings totaling 1,881,621 square feet. Each building comprising the Property has 34 floors with an overall height of 309 feet. In total, the Property has 1,712 Apartments, including two-bedroom apartments, one-bedroom apartments, and studio apartments.
20. Upon information and belief, Marina Tower became ground lessee of Gateway Plaza by a Memorandum of Lease Modification, dated July 1, 2009 (the "Ground Lease"), and recorded and filed in the Office of the City Register of the City of New York on July 6, 2009.
21. Plaintiff and members of the Class are lessees and tenants of Apartments in the Property pursuant to individual lease agreements (the "Lease") with Marina Tower (and/or with Marina Tower's predecessor(s)-in-interest) and thus became tenants of Marina Tower when it acquired the Ground Lease.
22. Plaintiff and members of the Class purchase electricity pursuant to an "Electricity Rider" attached to the Lease which provides that tenants shall purchase all electricity through Gateway Plaza's sub-metering system.

23. The Electricity Rider provides that Defendants shall sell electricity to tenants pursuant to the rules and regulations established by Battery Park City Authority. The electric charges are “deemed additional rent.”

24. Defendant (either directly or through its property management agent) controls the provision of electricity to tenants, operates the sub-metering system, invoices the tenants for their electrical use, collects payments for such use, and collects fees *in addition* to the utility charges that are not part of the Electricity Rider or subject to any other written agreement with tenants.

1. The Breach of the Warranty of Habitability

a. Nature of Breach

25. The building structure, insulation, windows, and PTAC units in the Property are defective and/or improperly installed and wholly insufficient to maintain habitable temperatures in the Apartments during the winter and summer months.

26. The Apartments are so susceptible to outside temperature fluctuations, in fact, that on cold days, significant condensation and ice accumulates on the inside of the windows and has to be cleared by the tenants themselves so that melting does not result in water damage.

27. Upon information and belief, members of the Class have taken to placing towels on windowsills to soak up the melting ice in order to prevent leakage into their Apartment(s).

28. Similarly, on hot days, members of the Class are forced to run their air conditioning units excessively in order to mitigate the hot air flowing through the same defects in insulation, windows, and PTAC units.

29. Upon information and belief, the effects of said defects are not limited to internal exposure to outside temperatures but also lead to deterioration of the exterior composite wall system and cause fungal growth.

b. Defective Conditions Described

30. The Property's construction at the exterior wall consists of a window wall system comprised of metal panels and aluminum sill and glass window units, including both fixed and operable units. Operable windows are double-hung units.

31. The Property's windows are generally in poor condition and poorly maintained.

32. Defendant has resorted to ineffectual stopgap measures, such as using sealant around window perimeters. However, these measures are not only ineffective but have made ordinary window operation difficult to impossible.

33. The PTAC units, which serve each room in the Apartments, are installed in the exterior wall system with a steel sleeve. The PTAC units are located below the windows and just above the floor levels on exterior walls. The PTAC units lack thermal breaks and dampers.

34. There are no thermal breaks at the aluminum window sills. Because of this, the sills readily conduct exterior temperatures to the interior of the unit.

35. Upon information and belief, the window frames and sashes are incapable of meeting industry standard requirements for energy efficiency and infiltration.

36. Because of the aforementioned design defects and the present condition of the wall, windows, and PTAC units, significant condensation forms and freezes on the interior windows and sills.

37. Similarly, because of these same defects, condensation is forming and freezing within the composite wall system of the exterior walls.

38. Freezing condensation in the cavity of exterior walls is a serious hazard as it can lead to structural deterioration of the composite wall system as well as environmental problems, including fungal growth.

39. Further compounding the conditions alleged, the Property's elevators and associated shafts are designed in such a way as to permit excessive air and exfiltration throughout the buildings. This condition results in both the Apartments, and buildings in general, to be under negative pressure. That, in turn, exacerbates the problems with the Apartments' inefficient temperature control by increasing the inflow of external air.

40. The negative airflow causes the Apartments to act as a vacuum, drawing in copious amounts of frigid or hot air from the outside through the windows and PTAC units. This only exacerbates the problems caused by the exterior wall design and insulation, windows, and PTAC units. The overall result is that the tenants are exposed to outside air temperatures on a dramatic scale.

c. Plaintiff And Class Members Suffer Harm

41. As a result of the above defects, Plaintiff and other members of the Class are forced regularly to endure inhabitable cold or hot temperatures in their Apartments from the inflow of outside air.

42. Indeed, Plaintiff and members of the Class have been forced to employ self-help measures in order to try to mitigate the flow of outside air into the Apartments.

43. Upon information and belief, tenants have taken to using such things as duct tape along the seams between the windows and the walls, using towels and pillows to block the flow of cold air from under the PTAC units, and wearing additional layers of clothing.

44. Even with the best efforts of Plaintiff and other members of the Class to mitigate the problems described herein, the temperatures inside the Apartments can still drop below 50 degrees on cold days. Some have been forced to close off and abandon the use of certain rooms or areas of their apartments.

45. Plaintiff and members of the Class are also forced to deal with the excessive condensation that builds up and freezes on the inside of their windows and sills.

46. In addition, in the likely event that condensation is collecting and freezing within the cavity of the external wall system, Plaintiff and members of the Class are being unknowingly subjected to the effects of structural damage and environmental hazards, including mold growth.

47. In February 2012, in response to repeated complaints by tenants about the frigid conditions, the ineffective heating systems, and exorbitant energy bills, Defendant informed tenants that all of their heating units, insulation, and windows would be repaired or replaced by December 2013. However, Defendant failed to follow through with this commitment.

48. An energy audit, performed by Defendant and released in 2013, recommended upwards of \$14 million in repairs and upgrades to the buildings, including new sub meters, PTAC units, new windows, and other measures to address the conditions described herein. The audit concluded that tenants would realize savings of more than \$789,000 per year (*i.e.*, \$450 per Apartment) in reduced electric costs as a result of the recommended repairs and upgrades. However, Defendant did nothing and allowed tenants to continue to suffer.

49. As evidenced in numerous cases brought against Defendant by the Department of Housing Preservation and Development (“HPD”), and in numerous non-payment proceedings brought by Defendant against various tenants, Defendant repeatedly has acknowledged violations of New York City laws and codes and/or been found to be in violation of such laws and codes relating to the provision of adequate heat due to the conditions described herein.

50. For example, as recently as May 22, 2014, in an HPD proceeding brought against Defendant for failure to provide heat, a New York Civil Court held that HPD “proved that it is entitled to an Order to Correct and Civil Penalties” and ordered Defendant to pay fines and, *inter*

alia:

Provide heat during the period from October 1 through May 31, so as to maintain in every portion of the subject premises used or occupied for living purposes:

- i. A temperature of at least 68 degrees Fahrenheit whenever the outside temperature falls below 55 degrees Fahrenheit, between the hours of 6 a.m. and 10 p.m.; and
- ii. A temperature of at least 55 degrees Fahrenheit whenever the outside temperature falls below 40 degrees Fahrenheit, between the hours of 10 p.m. and 6 a.m.

See Dept. of Housing Preservation and Development of the City of New York v. Marina Towers Associates, LP, et al., Index No. 646/14, Consent Order and Judgment attached hereto as Exhibit A.

51. Then, on May 23, 2014, Defendant publicly announced (*via* various press releases and statements and *via* letter sent to tenants) that they plan to replace approximately 3,100 PTAC units and approximately 1,700 electrical sub meters.

52. This PTAC and sub-metering replacement work was undertaken between October 2014 and April 2015.

53. As was expected, however, due to the underlying exterior wall defects, inspections revealed that there was, in fact, no material difference in excessive air filtration (and interior temperatures) between Apartments outfitted with older PTAC and those which had new PTAC units installed.

54. Tenants who had their units replaced saw no significant improvements. Thus, Replacement of PTAC units and sub-meters, without other necessary and remedial measures to address the conditions and violations, will be ineffective.

d. Unavoidable Energy Consumption Leads To Excessive Charges And Fees

55. As a result of the conditions alleged herein, Plaintiff and members of the Class are forced to operate their heating or air-conditioning systems continuously as well as employ supplemental space heaters on cold days in (often futile) attempts to maintain habitable temperatures. These measures cause Plaintiff and members of the Class to incur electricity charges that both vastly exceed what they reasonably should be paying and what tenants in other buildings are paying in comparable apartments.

56. While the provision of electricity to tenants is covered by their lease via the Electricity Rider, Defendant is the entity which actually supplies the electricity to tenants, purchasing the same from Con Edison, managing the sub-metering system, billing tenants, and collecting monthly payments.

57. Pursuant to the Electricity Rider, utility charges are deemed “additional rent.” However, Defendant collects additional fees from tenants above and beyond their monthly utility costs (*i.e.*, in addition to the amount Defendant pays Con Edison).

58. The additional fees collected by Defendant are not provided for in the Electricity Rider and are not subject to any other written agreement that tenants have with Defendant.

59. As a result, Defendant is profiting from the already unreasonably high electricity payments made by the Plaintiff and members of the Class, which, in turn, has created a disincentive for Defendant to remedy the conditions alleged herein.

FIRST CLAIM FOR RELIEF
(Violation of NY RPL §235-b)

60. Plaintiff re-alleges and incorporates by reference the allegations in all previous paragraphs of this Complaint.

61. By virtue of the acts complained of herein, Marina Tower has violated New York Real Property Law §235-b.

62. Marina Tower's failure to adequately repair/replace or otherwise remedy the structural defects, including faulty windows, insulation, and PTAC units, has resulted in temperatures and conditions in the Apartments which are dangerous, hazardous and detrimental to the life, health and safety of the Plaintiff and members of the Class and have thus rendered the Apartments unfit for human habitation in violation of the warranty of habitability under New York Real Property Law §235-b.

63. Plaintiff and the members of the Class have had to run their heating units at full power and employed separate electric heaters in often futile attempts to cure the effects of the conditions and defects in the Property and have thus incurred electricity bills far in excess of what they would be ordinarily absent Marina Tower's breach of the warranty of habitability.

64. Likewise, on hot days, Plaintiff and the members of the Class have had to run their air conditioning units at full power, in order to alleviate the hot air streaming in, due to the effects of the conditions and defects in the Property. This, in turn, has caused Plaintiff and members of the Class to incur electricity bills far in excess of what they should reasonably be, absent Marina Tower's breach of the warranty of habitability.

65. Plaintiff respectfully requests a judgment in the amount of the overpayment in electric charges Defendants have collected that are a direct result of Marina Tower's breach of the warranty of habitability established by New York Real Property Law §235-b.

66. Plaintiff also respectfully requests a judgment in the amount of rent abatements and refunds they and the Class are due as a direct result of Marina Tower's breach of the warranty of habitability established by New York Real Property Law §235-b.

SECOND CLAIM FOR RELIEF
(Breach of the Lease Agreement)

67. Plaintiff re-alleges and incorporates by reference the allegations in all previous paragraphs of this Complaint.

68. Pursuant to paragraph 11 of the Lease, Marina Tower is obligated to provide tenants with "heat and cool air throughout the Apartment."

69. By failing to adequately provide heat in the Apartments of the Plaintiff and members of the Class in the winter months and sufficient cool air in the summer months, Marina Tower has breached the express terms of the Lease.

70. Accordingly, Plaintiff and members of the Class are entitled to a judgment against Defendants in the amount to be determined at trial as a direct and proximate result of said breach.

THIRD CLAIM FOR RELIEF
(For Attorneys' Fees, Costs and Disbursements)

71. Plaintiff re-alleges and incorporates by reference the allegations in all previous paragraphs of this Complaint.

72. Pursuant to Paragraphs 19 and 21 of the Lease, Marina Tower is entitled to the recoupment of legal fees, costs and disbursements incurred in enforcing its rights under the Lease.

73. Pursuant to New York Real Property Law §234, Plaintiff and members of the Class are entitled to a reciprocal right to the recovery of such fees, costs and disbursements.

74. Accordingly, Plaintiff and members of the Class are entitled to a judgment against Marina Tower in the amount of their attorneys' fees, costs and disbursements in an amount to be determined at a hearing or trial.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff and members of the Class respectfully request that this Court enter judgment:

- A. Against Marina Tower for appropriate past and future rent abatements and/or monetary damages resulting from Marina Tower's breach of the warranty of habitability established by New York Real Property Law §235-b and insufficient attempts to remedy said breach;
- B. Against Marina Tower in the amount resulting from the overconsumption of electricity caused by Marina Tower's breach of the warranty of habitability established by the New York Real Property Law §235-b and Lease;
- C. Because Plaintiff and members of the Class have no adequate remedy at law for the ongoing breach of the warranty of habitability established by the New York Real Property Law §235-b, against Marina Tower for injunctive relief to undertake all appropriate and corrective remedial measures;
- D. Because Plaintiff and members of the Class have no adequate remedy at law for the ongoing breach of the lease, against Marina Tower for injunctive relief to undertake all appropriate and corrective remedial measures;

- E. Temporarily, preliminarily, and permanently enjoining Marina Tower from continuing to breach the warranty of habitability established by the New York Real Property Law §235-b and breach of the lease;
- F. Against Marina Towers for disgorgement of profits from fees earned as a direct and proximate result of excessive utility charges;
- G. Against Defendants in the amount of their attorneys' fees, costs and disbursements in an amount to be determined at a hearing or trial; and
- H. Granting such other and further relief as this Court deems just and proper.

DATED: New York, New York
July 10, 2017

NEWMAN FERRARA LLP

By: s/ Jeffrey M. Norton

Lucas A. Ferrara
Jeffrey M. Norton
1250 Broadway, 27th Floor
New York, New York 10001
(212) 619-5400
lferrara@nflp.com
jnorton@nflp.com

SAFIRSTEIN METCALF LLP.

Peter Safirstein
1250 Broadway, 27th Floor
New York, New York 10001
(212) 201-2845
psafirstein@safirsteinmetcalf.com

*Co-Lead Counsel for Plaintiff
and the Proposed Class*

SANFORD HEISLER, LLP

David Sanford

Andrew Melzer

1350 Avenue of the Americas, 31st Floor

New York, New York 10019

(646) 402-5655

dsanford@sanfordheisler.com

amelzer@sanfordheisler.com

Co-Counsel for Plaintiff

and the Proposed Class