PREPARED BY THE COURT

SARAH JACOBO, ET AL. Plaintiffs, vs. AVALONBAY COMMUNITIES, INC., ET AL., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: **BER-L-1083-15 (MAJOR CASE)** Civil Action **OPINION**
KESS EBURU, ET AL., Plaintiffs, vs. AVALONBAY COMMUNITIES, INC., ET AL., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: **BER-L-1527-15** Civil Action
ROSINA BARBASTEFANO ARAGON, ET AL., Plaintiffs, vs. AVALONBAY COMMUNITIES, INC., ET AL., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: **BER-L-1556-15** Civil Action
MARK BLANK, ET AL. Plaintiffs, vs. AVALONBAY COMMUNITIES, INC., ET AL., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: **BER-L-1577-15** Civil Action

ALI ABUKHAMSIN, ET AL. Plaintiffs, vs. AVALONBAY COMMUNITIES, INC., ET AL., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: **BER-L-1758-15** Civil Action
DAWOOD ALMESHER, Plaintiff, vs. AVALONBAY COMMUNITIES, INC., ET AL., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: **BER-L-2505-15** Civil Action
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ANDREW PAQUIN, ET AL. Plaintiffs, vs. AVALONBAY COMMUNITIES, INC., ET AL., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: **BER-L-2660-15** Civil Action
SARAH KAUFMAN, ET AL. Plaintiffs, vs. AVALONBAY COMMUNITIES, INC., ET AL., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: **BER-L-2662-15** Civil Action
YU OSAKADA, ET AL. Plaintiffs, vs. AVALONBAY COMMUNITIES, INC., ET AL., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: **BER-L-2784-15** Civil Action
NICOLE RUSSO, ET AL. Plaintiffs, vs. AVALONBAY COMMUNITIES, INC., ET AL., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: **BER-L-3112-15** Civil Action

MOHAMMAD AMIN MULLA, ET AL. Plaintiffs, vs. AVALONBAY COMMUNITIES, INC., ET AL., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: **BER-L-3192-15** Civil Action
DUK KYU KIM, ET AL. Plaintiffs, vs. AVALONBAY COMMUNITIES, INC., ET AL., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: **BER-L-3194-15** Civil Action
YOON KANG, a minor by his parent/guardian Kyoung Taek Kang (pro se) Plaintiff, vs. AVALONBAY COMMUNITIES, INC., ET AL., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: **BER-L-3269-15** Civil Action
JEONGGWAN LEE, ET AL. Plaintiffs, vs. AVALONBAY COMMUNITIES, INC., ET AL., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: **BER-L-3657-15** Civil Action

SANDRA G. MEDINA, ET AL. Plaintiffs, vs. AVALONBAY COMMUNITIES, INC., ET AL., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: **BER-L-4883-15** Civil Action
AZEEL ZAINADDIN, ET AL. Plaintiffs, vs. AVALONBAY COMMUNITIES, INC., ET AL., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: **BER-L-7603-15** Civil Action
HERBERT CLEMONS, ET. AL. Plaintiffs, vs. AVALONBAY COMMUNITIES, INC., ET AL., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: **BER-L-4415-16** Civil Action
JAN CARLO LANDI, ET. AL., Plaintiffs, v. AVALONBAY COMMUNITIES, INC., ET AL., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: **BER-L-501-17** Civil Action

THIS MATTER comes before the Court pursuant to eighteen (18) Motions for Summary Judgment, filed on or about July 24, 2017, by Ronald A. Giller, Esq. and Daniel J. DiMuro, Esq. from the law offices of Gordon & Rees LLP, counsel for Defendants AvalonBay Communities, Inc., et. als. (hereinafter, "AvalonBay") in the following consolidated matters: Jacobo et. al. v. AvalonBay Communities et. al., Docket No. BER-L-1083-15; Eburu et. al v. AvalonBay Communities et. al., Docket No. BER-L-1527-15; Blank et. al. v. AvalonBay Communities et. al., Docket No. BER-L-1577-15; Stathopolos et. al. v. AvalonBay Communities et. al., Docket No. BER-L-2653-15; Mittal et. al. v. AvalonBay Communities et. al., Docket No. BER-L-2657-15; Paquin et. al. v. AvalonBay Communities et. al., Docket No. BER-L-2660-15; Kaufman et. al. v. AvalonBay Communities et. al., Docket No. BER-L-2662-15; Osakada et. al. v. AvalonBay Communities et. al., Docket No. BER-L-2784-15; Mulla et. al. v. AvalonBay Communities et. al., Docket No. BER-L-3192-15; Kim et. al. v. AvalonBay Communities et. al., Docket No. BER-L-3194-15; Lee et. al. v. AvalonBay Communities et. al., Docket No. BER-L-3657-15; Medina et. al. v. AvalonBay Communities et. al., Docket No. BER-L-4883-15; Zainaddin et. al. v. AvalonBay Communities et. al., Docket No. BER-L-7603-15; Walters et. al. v. AvalonBay Communities et. al., Docket No. BER-L-9128-15; Reilly et. al. v. AvalonBay Communities et. al., Docket No. BER-L-10306-15; Lee et. al. v. AvalonBay Communities et. al., Docket No. 1745-16; Clemons et. al. v. AvalonBay Communities et. al., Docket No. BER-L-4415-16; and Landi et. al. v. AvalonBay Communities et al., Docket No. BER-L-501-17.

FACTUAL BACKGROUND

This action arises out of a fire that occurred on January 21, 2015 at the Avalon at Edgewater apartment complex located in Edgewater, New Jersey. The Jacobo Plaintiffs filed their initial Complaint on or about January 29, 2015. The Eburu Plaintiffs filed their initial Complaint on or about February 10, 2015. The Blank Plaintiffs filed their initial Complaint on

or about February 13, 2015. The Abukhamsin Plaintiffs filed their initial Complaint on or about February 23, 2015. On or about March 16, 2015, the Stathopolos Plaintiffs, Mittal Plaintiffs, Paquin Plaintiffs, and Kaufman Plaintiffs filed their respective initial Complaints. The Osakada Plaintiffs filed their initial Complaint on or about March 19, 2015. The Mulla Plaintiffs and Kim Plaintiffs filed their respective initial Complaints on or about April 2, 2015. The Lee Plaintiffs filed their initial Complaint on or about April 17, 2015. The Medina Plaintiffs filed their initial Complaint on or about May 22, 2015. On or about June 26, 2015, the Court granted a Motion filed by the Jacobo Plaintiffs to consolidate the foregoing matters with Docket No. BER-L-1083-15.

The Zainaddin Plaintiffs filed their initial Complaint on or about August 19, 2015. The Walters Plaintiffs filed their initial Complaint on or about October 19, 2015. The Reilly Plaintiffs filed their initial Complaint on or about November 30, 2015. The Chang Lee Plaintiffs filed their initial Complaint on or about February 26, 2016. On or about July 19, 2016, the Court granted a Motion filed by the Jacobo Plaintiffs to consolidate the foregoing matters with Docket No. BER-L-1083-15. The Clemons Plaintiffs filed their initial Complaint on or about June 6, 2016, which was consolidated with Docket No. BER-L-1083-15 on or about August 8, 2016. The Landi Plaintiffs filed their initial Complaint on or about January 18, 2017, which was also subsequently consolidated with Docket No. BER-L-1083-15 on or about March 9, 2017. The discovery period concluded on June 12, 2017. A firm trial date is scheduled for October 2, 2017. AvalonBay has since filed these 18 Motions for Summary Judgment.

SUMMARY JUDGMENT STANDARD

The New Jersey procedural rules state that a court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that

the moving party is entitled to a judgment or order as a matter of law." N.J.S.A. § 4:46-2(c). In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the Supreme Court set forth a standard for courts to apply when determining whether a genuine issue of material fact exists that requires a case to proceed to trial. Justice Coleman, writing for the Court, explained that a motion for summary judgment under N.J.S.A. § 4:46-2 requires essentially the same analysis as in the case of a directed verdict based on N.J.S.A. § 4:37-2(b) or N.J.S.A. § 4:40-1, or a judgment notwithstanding the verdict under N.J.S.A. § 4:40-2. Id. at 535-536. If, after analyzing the evidence in the light most favorable to the non-moving party, the motion court determines that "there exists a single unavoidable resolution of the alleged dispute of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of N.J.S.A. § 4:46-2." Id. at 540.

1. The Plaintiffs Have Sufficiently Plead Facts to Establish That AvalonBay Owed A Duty to Them.

Under New Jersey law, in order to establish a claim of negligence, a plaintiff must demonstrate: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by the defendant; (3) an injury to the plaintiff; and (4) the injury must be proximately caused by the defendant's breach of the duty. See Caputzal v. The Lindsay Co., 48 N.J. 69, 74-75 (1966). "Negligence will not be presumed; rather, it must be proved." Rocco v. N.J. Transit Rail Ops., Inc., 330 N.J. Super. 320, 338-39 (App. Div. 2000). The New Jersey Supreme Court has held that generally a landowner may be liable for a fire started on his property if that property was kept in an unsafe or dangerous condition and the landowner did not take reasonable precautions to stop the spread of the fire. B.W. King, Inc. v. Town of West New York, 49 N.J. 318, 327 (1950). The New Jersey Supreme Court further held that:

> There is no general rule or policy requiring expert testimony as to the standard of care …. The test of need for expert testimony is

> whether the matter to be dealt with is so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of the party was reasonable.

Butler v. Acme Markets, Inc., 89 N.J. 270, 283 (1982).

In this action, the Jacobo Plaintiffs, Kim Plaintiffs, Mulla Plaintiffs, Zainaddin Plaintiffs, Eburu Plaintiffs, Mittal Plaintiffs, Blank Plaintiffs, Medina Plaintiffs, Walters Plaintiffs, Paquin Plaintiffs, Kaufman Plaintiffs, Stathopolos Plaintiffs, Lee Plaintiffs, Chang Lee Plaintiffs, Clemons Plaintiffs, Osakada Plaintiffs, Reilly Plaintiffs and Landi Plaintiffs all brought negligence claims against AvalonBay. AvalonBay now moves the Court to dismiss these claims with prejudice as they contend that all the Plaintiffs fail to establish a duty owed to them. AvalonBay contends that the lack of an expert warrants dismissal of these claims. However, the case cited by AvalonBay dealt with fire sprinkler inspections, which the Appellate Division has held to be "a complex process involving an assessment of a myriad of factors" and "is beyond the ken of the average juror." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 408 (2014) (quoting Giantonnio v. Taccard, 291 N.J. Super. 31, 44 (App. Div. 1996)).

The Davis matter involved complex issues that an ordinary layperson without the proper training would not be able to comprehend. The New Jersey Supreme Court noted that the State's "fire codes and standards are particularly complex." Id. In order to determine the appropriate standard of care, familiarity with those standards, as well as other provisions of the fire code, is necessary to determine the appropriate standard of care. Davis, 219 N.J. at 409.

The instant matter does not involve fire sprinkler installation or New Jersey's fire codes and standards. It involves an apartment complex constructed out of non-fire retardant materials. The fire occurred due to an errant spark allegedly caused by a maintenance worker of AvalonBay. The fact that constructing a building out of non-fire retardant materials could lead to a fire is not "so esoteric" that a juror of common knowledge would not be able to form a valid

judgment as to whether AvalonBay was reasonable in constructing the apartment complex this way. Butler, 89 N.J. at 283. A juror of common knowledge could find that AvalonBay owed the Plaintiffs a duty to construct the building in a safe way. As such, this is a question of fact for the jury based on the evidence adduced at trial.

2. A Question of Fact Exists as to Whether the Plaintiffs Can Demonstrate Unlawful Conduct by AvalonBay.

A plaintiff must prove the following elements in order to sustain a claim under the New Jersey Consumer Fraud Act, N.J.S.A. §§ 56:8-1, et. seq. ("CFA"): (1) unlawful conduct by the defendant; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendant's unlawful conduct and the plaintiff's ascertainable loss. See New Jersey Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 12-13 (App. Div. 2003), certif. denied, 178 N.J. 249 (2003) (citing Cox v. Sears Roebuck & Co., 138 N.J. 2, 24 (1994)).

A plaintiff can meet the first element of a claim under the CFA, "unlawful conduct," by establishing (1) misrepresentations; (2) knowing omissions; or (3) a violation of one of the regulations which is statutorily identified in the CFA. In pertinent part, N.J.S.A. § 56:8-2 defines "unlawful conduct" as:

> [t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise … whether or not any person has in fact been misled, deceived or damaged thereby[.]

N.J.S.A. § 56:8-2.

Here, all the Plaintiffs have claimed, in each of their Complaints, that AvalonBay violated the CFA by failing to disclose the inflammable materials used in the construction of the apartment complex, the failure to provide adequate fire blockage and suppression systems, the

employment of unlicensed maintenance workers, and the company's history of fires at properties owned and managed by AvalonBay. AvalonBay merely contends that Plaintiffs do not have any evidence to show actual unlawful conduct on the part of AvalonBay. The Plaintiffs do allege that AvalonBay advertised the apartment complex in Edgewater as safe luxury apartments. This is similar to Gennari v. Weichert Co. Realtors, 148 N.J. 582, 606 (1997), where the New Jersey Supreme Court noted that the defendant "made affirmative misrepresentations about the builder's experience and qualifications as well as the quality of his homes." "The misrepresentation has to be one which is a statement of fact, found to be false, made to induce the buyer to make the purchase.'" Gennari, 148 N.J. at 607 (quoting Gennari v. Weichert Co. Realtors, 288 N.J. Super. 504, 535, aff'd as modified, 148 N.J. 582 (1997)).

AvalonBay has made numerous statements regarding the quality of the building as well as the quality of the maintenance and repairs. Prospective tenants relied on these statements in their decision to lease apartments with AvalonBay. There is sufficient evidence for a jury to find that AvalonBay made material misrepresentations in violation of the CFA. As such, this is a question of fact for the jury based on the evidence to be adduced at trial.

3. The Punitive Damages Claims Must Be Bifurcated and Will Be Awarded If the Evidence Adduced at Trial Supports Such an Award.

In New Jersey, the standard for the recovery of punitive damages is codified in the New Jersey Punitive Damages Act. N.J.S.A. § 2A:15-5.12(a) states in pertinent part:

> Punitive damages may be awarded to the plaintiff only if the plaintiff proves, by clear and convincing evidence, that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions. This burden of proof may not be satisfied by proof of any degree of negligence including gross negligence.

N.J.S.A. § 2A:15-5.12(a); see Allendorf v. Kaiserman Enterprises, 266 N.J. Super. 662, 675 (App. Div. 1993). The statute defines "actual malice" as "an intentional wrongdoing in the sense of an evil-minded act," and "wanton and willful disregard" as "a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission." N.J.S.A. § 2A:15-5.10.

N.J.S.A. § 2A:15-5.13 states that any actions involving punitive damages shall be conducted in a bifurcated trial. It explains that:

> b. In the first stages of a bifurcated trial, the trier of fact shall determine liability for compensatory damages and the amount of compensatory damages or nominal damages. Evidence relevant only to the issues of punitive damages shall not be admissible in this stage.
>
> c. Punitive damages may be awarded only if compensatory damages have been awarded in the first stage of trial. An award of nominal damages cannot support an award of punitive damages.

N.J.S.A. § 2A:15-5.13(b) and (c).

In this matter, the Plaintiffs have all brought claims for punitive damages. AvalonBay seeks to have them dismissed because they contend that the Plaintiffs have failed to establish entitlement to them as a matter of law. It would, however, be premature to dismiss such claims without giving the Plaintiffs the opportunity to prove their case before a jury, which will have the ability to determine whether or not AvalonBay is liable. N.J.S.A. § 2A:15-5.13(b). The issue of punitive damages will be bifurcated and only considered if the jury determines AvalonBay is negligent. N.J.S.A. § 2A:15-5.13(c). As such, the issue of punitive damages must be preserved and determined at trial based on the initial verdict of the jury as trier of fact.

4. The Plaintiffs Are Unable to Establish Their Respective Claims for Negligent Infliction of Emotional Distress.

A plaintiff may only maintain an action for negligent infliction of emotional distress under two scenarios. First, "[a] plaintiff can demonstrate that the defendant's negligent conduct placed the plaintiff in reasonable fear of immediate personal injury, which gave rise to emotional distress that resulted in a substantial bodily injury or sickness." Jablonowska v. Suther, 195 N.J. 91, 104 (2008). "[A]fter Falzone, courts considered emotional distress that accrued to any plaintiff who was within the 'zone of risk' created by the negligent conduct, so long as substantial bodily injury or sickness also resulted from the fright." Id. at 103.

A plaintiff can alternatively maintain an action for negligent infliction of emotional distress by satisfying the four elements set forth in Portee v. Jaffee, 84 N.J. 88, 101 (1980). The New Jersey Supreme Court cautioned that liability for the emotional consequences of a party's negligence should be strictly limited to conduct that is reasonably likely to have a significant negative effect on the average person's "basic emotional stability." Id. To extend liability beyond that point would welcome "speculative results" and "inflict undue harm by imposing an unreasonably excessive measure of liability." Id. at 97, 99. Thus, claims for the negligent infliction of emotional distress are permitted only in very limited circumstances.

There is no recovery unless the distress a plaintiff experiences resulted from the fear of being harmed while in the "zone of danger." Russo v. Nagel, 358 N.J. Super. 254, 270 (App. Div. 2003) (denying liability because plaintiff did "not allege, nor [did] the factual allegations support, a cause of action based on bodily injury or sickness resulting from fright or apprehension of danger"). Moreover, in order to survive summary judgment in a "zone of danger" case, a plaintiff must present medical evidence that links a severe psychological condition to plaintiff's fear for her personal safety. Falzone v. Busch, 45 N.J. 559, 564-70.

Absent a plaintiff establishing the requisite elements of a claim for negligent infliction of emotional distress, a dismissal on summary judgment is appropriate. See, e.g., Hinton v. Meyers, 416 N.J. Super. 141, 148 (App. Div. 2010) (affirming the trial court's dismissal of a negligent infliction of emotional distress claim on summary judgment where the plaintiff was unable to establish the requisite elements).

Based on the facts in this matter, the Plaintiffs that brought claims of negligent infliction of emotional distress cannot satisfy these elements. First, the Portee scenario requires the Plaintiffs to have witnessed the death, or serious bodily injury, of a person with whom they shared a marital or intimate, familial relationship with. Jablonowska, 195 N.J. at 103. None of the Plaintiffs that brought these claims received any medical or psychological treatment at the time of the fire nor have they provided any evidence of any substantial bodily injury or sickness that resulted from any emotional distress allegedly caused by the fire. There is also no evidence that any of the Plaintiffs experienced emotional distress that rose to the heightened levels required to bring such a claim. Trisuzzi v. Tabatchnik, 285 N.J. Super. 15, 27 (App. Div. 1995) (quoting Eyrich v. Dam, 193 N.J. Super. 244, 253 (App. Div. 1983), certif. denied, 97 N.J. 583 (1983)) ("To be compensable, emotional distress must be 'sufficiently substantial to result in physical illness or serious psychological sequelae.'").

The Plaintiffs do not proffer any evidence that any of them sought contemporaneous medical treatment or even belated therapy by any psychological expert or practionar. However, they cite to two situations where a party may bring such a claim without an expert. See Wigginton v. Servidio, 324 N.J. Super. 114 (App. Div. 1999); see also Innes v. Marzano-Lesnevich, 435 N.J. Super. 198 (App. Div. 2014). Wigginton dealt with a plaintiff testifying to her emotional distress caused by an alleged sexual assault in the workplace. Wigginton, 324 N.J. Super. at 123-24. That plaintiff suffered from "nausea and diarrhea and had difficulties with her

personal relationship with her husband and children" as a result of her sexual assault. Id. Innes involved a woman who abducted her daughter and fled to Spain in the midst of a custody action. Innes, 435 N.J. Super. at 206. In that case, the Appellate Division ruled that the loss was "particularly personal in nature – the inability of a father to see his daughter for many years, and the likely prospect that he may never see her again." Id. at 241. "The emotional distress caused by the irreparable severance of the parent-child bond is expected, undoubtedly genuine and easily appreciated by the average person without the need for expert testimony." Id.

Counsel for the Plaintiffs argues that this case in analogous to Wigginton where the plaintiff suffered a workplace sexual assault or Innes where plaintiff was deprived of contact with his daughter and feared losing her for good. However, this matter does not involve the same situational gravity that is present in both Wigginton and Innes. There is no evidence proffered that any of the Plaintiffs were in fear for themselves or for any family members, or even any pets, being in the structure while the fire occurred. They merely feared for their possessions and household items. Because the Plaintiffs claiming negligent infliction of emotional distress cannot establish the requisite elements, these claims must be dismissed. Hinton, 416 N.J. Super. at 148.

5. The Breach of Contract Claims Fail as AvalonBay Was Within Its Rights Under the Lease Agreement to Terminate the Lease in the Event of a Fire.

In New Jersey, to state a claim for breach of contract, a plaintiff must prove each of the following elements:

1) The existence of a valid contract;

2) The breaching party failed to perform as specified by the contract; and

3) The non-breaching party suffered an economic loss as a result of the other party's breach.

See Murphy v. Implicito, 392 N.J. Super. 245 (App. Div. 2007).

In this matter, both signatory Plaintiffs and non-signatory Plaintiffs brought breach of contract claims against AvalonBay. Regarding the signatory Plaintiffs, AvalonBay properly terminated the Lease Agreements. Section 31 of the Lease states, in pertinent part:

> If you become aware of damage to the Apartment by fire, water or other hazard, or you become aware of malfunction of equipment or utilities, you agree to notify us immediately …. If we determine, in our sole discretion, that the damages are of such an extent and nature that we cannot make the Apartment fit for occupancy within a reasonable period of time, we will provide you with a written notice of termination and this Lease will end on the date specified in the notice. If the Lease is terminated, you will be liable for Rent only up to the date you vacate the Apartment[.]

Pursuant to the Lease Agreements, in the event of a fire, AvalonBay had the right to immediately terminate the Lease Agreements for the apartment complex and this is exactly what happened. On January 22, 2015, one day after the fire, AvalonBay sent a mass e-mail to all of the residents, which stated:

> The Russell Building sustained more serious damage than the River Building and therefore, in accordance with the terms of your lease, if your apartment is in the Russell Building, the lease term will end on January 21, 2015. Because on the unfortunate circumstances leading to this lease termination, we are arranging for residents of the Russell Building to receive their security deposit refund in full and the pro-rated portion of January rent in an expedited manner.

On January 23, 2015, AvalonBay sent out another mass e-mail to all residents explaining the damage caused by the fire and how the apartments were not going to be able to be reoccupied. As such, the Lease Agreements were terminated as of January 21, 2015. These e-mails clearly explain the nature of the damage and the fact that the apartments were no longer habitable, in accordance with Section 31 of the Lease Agreements. AvalonBay properly terminated the Lease Agreements with the signatory Plaintiffs. They did not breach their Lease Agreements with the signatory Plaintiffs, which is a prerequisite to such a breach of contract claim. Murphy, 392 N.J. Super. at 267.

Regarding the non-signatory Plaintiffs, they lack standing to assert a breach of contract claim. In New Jersey, "standing is an element of justiciability that cannot be waived or conferred by consent." In re Adoption of Baby T, 160 N.J. 332, 341 (1999). Instead, it is a threshold inquiry because "[a] lack of standing by a plaintiff precludes the court from entertaining any of the substantive issues for determination." Id. at 340. Standing is governed by R. 4:26-1, which provides "[e]very action may be prosecuted in the name of a real party in interest …." To have standing in a case, the New Jersey Supreme Court has held "a party must present a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision." In re Camden Cnty., 170 N.J. 439, 449 (2002).

Here, the non-signatory Plaintiffs were not parties to the Lease Agreements because they did not sign the leases. However, they erroneously allege that they were indeed parties to the Lease Agreements. In order to assert a breach of contract claim, a plaintiff must be a party to the contract that was allegedly breached. Id. at 449. That is not the case here with the non-signatory Plaintiffs. As such, the breach of contract claims brought by the signatory Plaintiffs and non-signatory Plaintiffs must be dismissed.

6. The Plaintiffs Cannot Plead the Elements for the Breach of Implied Warranty of Habitability Claims.

The implied warranty of habitability is a duty of the landlord. Dowler v. Boczkowski, 148 N.J. 512, 521 (1997). As a prerequisite to bringing a claim for breach of an implied warranty of habitability, "the tenant must give the landlord positive and seasonable notice of the alleged defect, must request its correction, and must allow the landlord a reasonable period of time to effect the repair or replacement." Berzito v. Gambino, 63 N.J. 460, 469 (1973). If the requirements are met, the tenant may regard the breach as a constructive eviction and quit the

premises, may conduct the repair himself and deduct the cost from the rent owed, or seek a rent abatement. See Drew v. Pullen, 172 N.J. Super. 570, 573 (App. Div. 1980).

In this matter, the Plaintiffs have brought claims for breach of the implied warranty of habitability against AvalonBay, including the individual Defendants Wannamaker, Sanchez and Fritz, the maintenance workers. As a preliminary matter, these individual defendants were not the landlords, nor were they even parties to the Lease Agreements. As such, a breach of the implied warranty of habitability is not actionable against Defendants Wannamaker, Sanchez and Fritz. Dowler, 148 N.J. at 521.

It is undisputed that the "defect" the Plaintiffs contend is actionable in their respective Complaints is the fire that destroyed the entire building on January 21, 2015. It is also undisputed that no notice was given, nor was an opportunity to cure given. Berzito, 63 N.J. at 469. In fact, there were no complaints about the habitability of the apartment complex before the fire, but only after the fire occurred destroying the building. Furthermore, the Plaintiffs who brought these claims are not entitled to any of the three remedies because AvalonBay terminated the Lease Agreements effective the day of the fire, as well as refunded the Plaintiffs the pro-rated portion of their rent for the remainder of the month and their entire security deposit. As such, these claims for breach of the implied warranty of habitability must be dismissed.

7. The Plaintiffs That Assert Claims for Private and Public Nuisance Against AvalonBay Fail to Plead Facts to Establish Such Claims.

Under New Jersey law, to establish a private nuisance, a plaintiff must demonstrate an invasion of its interest in the private use and enjoyment of land. Such invasion must amount to an unreasonable, unwarranted or unlawful use by a person of the plaintiff's real property, which results in a material annoyance, inconvenience or hurt. N.J. Tpk. Auth. v. PPG Indus., 16 F. Supp. 2d 460, 478 (D.N.J. 1998); see also Rowe v. E.I. Dupont De Nemours & Co., 262 F.R.D.

451, 459 (D.N.J. 2009). This invasion of one's interest in private use and enjoyment of the land can be intentional or caused by negligent and reckless conduct, or an abnormally dangerous activity. Jersey City Redevelopment Auth. v. PPG Indus., 655 F. Supp. 1257, 1265 (D.N.J. 1987); see also Ross v. Lowitz, 222 N.J. 494, 506 (2015).

A public nuisance consists of unreasonable interference with the exercise of a right to real property common to the general public. Rockaway v. Klockner & Klockner, 811 F. Supp. 1039, 1056 (D.N.J. 1993); see also In re Lead Paint Litig., 191 N.J. 405, 422 (2007). A plaintiff has standing to assert a claim of public nuisance only if he has suffered "special injury." Id. To meet the "special injury" requirement, the plaintiff "must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference." Rockaway, 811 F. Supp. at 1056 (quoting Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303, 315 (3d Cir. 1985).

In this matter, several Plaintiffs have brought both private and public nuisance causes of action. With regard to the private nuisance claims, the Plaintiffs who brought these claims merely state that AvalonBay's actions and failures to act constitute an intentional and unreasonable invasion of their interest in the private use and enjoyment of the residence. However, these mere conclusory statements are not enough to support a private nuisance claim. The Plaintiffs do not identify what the specific purported nuisance is. Assuming, arguendo, that the Plaintiffs are claiming the plumbing repair was the purported nuisance, they do not proffer any evidence to show that any conduct was intentional or that the plumbing repair was an abnormally dangerous activity. Jersey City Redevelopment Auth., 655 F. Supp. at 1265. As such, the private nuisance claims against AvalonBay and the individual Defendants Wannamaker, Sanchez and Fritz must be dismissed.

With regard to the public nuisance claims, the Plaintiffs who brought these claims merely claim that AvalonBay's conduct constituted a significant interference with the public safety by failing to protect them from the risk of fires. However, this conclusory statement is inaccurate. AvalonBay constructed this apartment complex in accordance with the applicable building codes and fire codes. As constructed, it was a safe building to the general public. Furthermore, the fire that occurred did not affect the general public, but those who lived in the apartment complex, specifically the Plaintiffs in this action. The Plaintiffs who brought these claims do not state what the unreasonable interference was. Rockaway, 811 F. Supp. at 1056. Also, none of these Plaintiffs provide any evidence that any of them suffered a "special injury." Id. As such, the public nuisance claims against AvalonBay and the individual Defendants Wannamaker, Sanchez and Fritz must also be dismissed.

8. The Various Claims for Damages Brought by the Plaintiffs Are Preserved for Trial and Will Be Awarded Accordingly If the Evidence Admitted at Trial Warrants Such Awards.

In this matter, all of the Plaintiffs have brought claims to recover various types of damages. Such claims for damages include opportunity cost damages, or the time spent for the Plaintiffs to recreate their lives following the fire, lost wages, damage to personal property, lost profits/income, lost employment, cost of vacation following the fire, damage to intellectual property, emotional distress and other health issues, jewelry and rare art valuations, failed IPO, and the sentimental value of lost personal possessions.

While the Court is unwilling dismiss the issue of damages before the trial, New Jersey case law pertaining to the recovery of damages must be discussed. The Appellate Division has consistently held that "the owner of an article of personal property is competent to testify as to his estimate of the value of his own damaged property and that the extent of its probative value is for the consideration of the fact-finder." Penbara v. Straczynski, 347 N.J. Super. 155, 162 (App.

Div. 2002) (citing Lane v. Oil Delivery, Inc., 216 N.J. Super. 413, 419 (App. Div. 1987)); see also N.J. R. Evid. 701. Should the personal property have been brand new, proof of its original cost may sustain an owner's burden of proof as to the value, such as a receipt. State v. Romero, 95 N.J. Super. 482, 487 (App. Div. 1967). While the Plaintiffs are not required to prove their losses with precision or certainty, Totaro, Duffy, Cannova and Co. v. Lane, Middleton & Co., 191 N.J. 1, 14 (2007), they are required to prove to a jury "facts to make a fair and reasonable estimate." Lane, 216 N.J. Super. at 420. The Plaintiffs' claims for sentimental value, however, along with such other esoteric valuation claims are barred. See Lane, 216 N.J. at 419. While the law does permit a plaintiff to recover for the loss of enjoyment of life, which is an inability to pursue one's normal pleasure and enjoyment. See Model Jury Charges (Civil) 8.11E "Disability, Impairment and Loss of the Enjoyment of Life, Pain and Suffering (May 2017). However, this jury charge is only for a personal injury claim, which is absent in this matter. As such, the Plaintiffs are not entitled to recover for the loss of enjoyment of life.

While an owner of personal property may testify to the value of his own personal property, certain items that can be appraised, such as land, antiques and jewelry, would have to be substantiated by expert testimony, appraisal or receipts. See Jacobitti v. Jacobitti, 263 N.J. Super. 608, 613 (App. Div. 1993). Economic damages are recoverable when they are the natural and probable consequence of a defendant's negligence in the sense that they are reasonably to be anticipated in view of a defendant's capacity to have foreseen that the particular plaintiff, or identifiable class of plaintiffs, is demonstrably within the risk created by a defendant's negligence. People Express Airlines v. Consol. Rail Corp., 100 N.J. 246, 267 (1985); see also Robinson v. Gonzalez, 213 N.J. Super. 364, 370 (App. Div. 1986).

Plaintiffs wish to admit economist Michael Soudry's report detailing the time and money the Plaintiffs spent recreating their lives after the fire. While AvalonBay wishes to have the

Court dismiss these opinions of Mr. Soudry, the Court cannot rule on their admissibility on summary judgment. Similarly, any reports generated detailing how the fire may have exacerbated a health condition, such as kidney failure or heart disease, cannot be barred by the Court at this time.

As such, while the Plaintiffs may testify to the value of their everyday lost personal items, they must show by receipts, invoices, appraisals or expert testimony the actual value of any rare and valuable items such as jewelry, antiques and art along with any claims of any economic damages that allegedly arose from the fire. The value of these items is beyond the ken of an average juror, requiring the witness who would testify to the value to have sufficient expertise in the given field. See Landrigan v. Celotex Corp., 127 N.J. 404, 413 (1992); see also N.J. R. Evid. 702.

Therefore, for the foregoing reasons, AvalonBay's Motions for Summary Judgment are **GRANTED IN PART** and **DENIED IN PART**.