Matter of Byrne

OATH Index No. 223/04 (June 20, 2005), adopted, Loft Bd. Order No. 3016 (Feb. 16, 2006)
[Loft Bd. Dkt. No. TH-0172; 5 West 21st Street, N.Y., N.Y.]

Tenants' harassment application should be granted in part and denied in part. Tenants' harassment claims were sustained where owner sent repeated, improper access notices to perform legalization work; owner repeatedly refused tenants' requests for a schedule of the work to be done to notify them of demolition and loss of essential services; owner created situation where, prior to January 9, he sent an access notice to start work but refused to confirm the start date despite Loft Board requirement and tenants' requests, and then, on January 9, owner cancelled the work and, minutes later, insisted upon gaining access while he videotaped petitioners; owner rendered tenants' unit uninhabitable for 19 days; and owner failed to give advance notice that bathroom would be unavailable for two days, and tenants were left with their toilet sitting in their bathtub. Tenants' application is otherwise denied. Owner did not establish a defense to harassment by proof of completed work. Owner's request that tenants be fined for filing a frivolous application is denied. Owner is fined $5,000 and is barred from filing an application to terminate this finding of harassment for two years.

Loft Board adopts findings of harassment pursuant to 29 RCNY 2-01, but rejects findings made pursuant to 29 RCNY 2-01(g) and (h). Loft Board imposes $5,000 fine.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
SUSAN BYRNE and WILLIAM CONNORS
Petitioners
- against -
DANIEL PELLI,
Respondent

REPORT AND RECOMMENDATION

TYNIA D. RICHARD, *Administrative Law Judge*

This harassment application is filed pursuant to section 2-02(c)(1) of the Loft Board rules (title 29, Rules of the City of New York (RCNY)). Petitioners Susan Byrne and William Connors

are protected residential occupants of the fifth floor unit of the interim multiple dwelling (IMD) located at 5 West 21st Street, New York, New York. Respondent Daniel Pelli is the owner of the building. In their application, which consists of an original harassment application, dated February 11, 2003, and an amended (supplemental) pleading, dated October 13, 2003, petitioners allege 43 separate instances of harassment occurring during a two-month renovation of their IMD unit for which they seek the imposition of civil penalties. 29 RCNY § 2-02 (d)(ii). Asserting that the application is frivolous, Mr. Pelli requests that a civil penalty be assessed in accordance with 29 RCNY § 2-02 (c)(2)(iii).

A lengthy hearing on the issues was held on seven days, namely, October 31, November 10, and November 20, 2003, and February 24, March 9 and 26, and May 7, 2004, comprising 1,600 pages of testimony, 75 petitioners' exhibits, and 32 respondent's exhibits.[1] Petitioners each testified and called Mr. Pelli as an adverse witness. Respondent testified and called petitioners as adverse witnesses; he also called his contractor, Michael Sklar, and Carl Wisotsky, the referee appointed by the Supreme Court to oversee a part of the renovation. The record was closed on June 21, 2004, following the submission of post-trial briefs.

For the following reasons, I find that petitioners proved allegations of harassment set forth in paragraphs 2, 4, 5, 7, a part of 11 and 12, 13, 31 and 33, and failed to prove the remainder of their application. Accordingly, I recommend the imposition of civil penalties in the amount of $1,000 per instance of harassment, for a total amount of $5,000.[2] I do not recommend imposing civil penalties on the petitioners as requested by Mr. Pelli.

Introduction

Prior to the trial of this matter, on its own motion, this tribunal severed and stayed 11 allegations originally contained in this application which asserted claims of unreasonable interference. *See Matter of Connors*, OATH Index No. 223/04, mem. dec. (Nov. 7, 2003) (severing and staying paragraphs 18, 19, and 34 through 42 of the harassment application and amended

---

[1] Citations to the transcripts include roman numerals denoting the sequential date of trial ("I," "II," "III," "IV," "V," "VI," and "VII") and the page number of that day's transcript, e.g., "(I: 121)" refers to page 121 of the first day's trial transcript.

[2] As more fully explained below, paragraphs 2, 4, 5, and 7 are counted as a single instance of harassment, and paragraphs 11 and 12 are counted as a single instance of harassment.

pleading). At the time of that decision, the certificate of occupancy had been issued and a challenge to its validity was on appeal. I rendered my decision on the grounds of judicial economy, noting that this tribunal had already stayed four other applications filed in connection with the premises, which included tenants' applications seeking rulings of non-compliance, rent overcharge, and unreasonable interference, and an alternate plans application. *See Matter of Connors*, OATH Index No. 442/03, mem. dec. (Jan. 21, 2003); *Matter of Connors*, OATH Index Nos. 1092/03, 1097/03, 1100/03, mem. dec. (Mar. 14, 2003).

Also prior to trial, respondent made a motion to dismiss or to strike the harassment application on the grounds of *res judicata*, asserting that the harassment claim was heard in a prior-filed Supreme Court action. I denied the motion finding that the Supreme Court's prior order explicitly refused to address the tenants' harassment claim "so that it may be heard here, apparently finding the Loft Board the appropriate forum for such claims." *Matter of Connors,* OATH Index No. 223/04, mem. dec. (Oct. 27, 2003). I also noted that Mr. Pelli's representations of the content of the Supreme Court order were "glaringly inconsistent – even in direct contradiction – with its actual content."

Background

The building that is the subject of this application is a five-floor walk-up located at 5 West 21st Street. Mr. Connors and Ms. Byrne, who are married (referred to herein collectively as "petitioners"), reside on the fifth floor. Mr. Pelli resides on the third floor. Petitioners are the last remaining IMD tenants in the building. I will not recite the entire litigation history of the parties here, as the cases are a matter of public record, but suffice to say that it is significant. Some of the prior litigation is necessary to describe, however, either as background or because it is relevant to claims alleged here.

Mr. Pelli reopened the narrative statement process in September 2002 (Resp. Ex. T), and petitioners submitted a set of alternate plans in November 2002 (I: 27-29, VI: 12, 38-40; Pet. Ex. 1). As has been noted, their alternate plans application was stayed pending a decision on the certificate of occupancy (which was invalidated as the trial of this matter was being conducted). Because of the stay, Pelli told petitioners that he would do the work that remained to legalize the building

according to their plans without waiting for Loft Board approval. Petitioners agreed, despite their trepidation about accepting Mr. Pelli's promises in lieu of Loft Board supervision.

Petitioners attribute their trepidation to a long, tortured history of being misled by Mr. Pelli when work that was promised was not done (I: 23, 35, 37-38), which culminated with Pelli obtaining a certificate of occupancy ("C of O") based upon false certifications made by him and his agents. The record reflects that a C of O was issued to Pelli on March 7, 2000, when significant parts of the narrative statement work remained to be done. Petitioners have spent the last several years challenging the validity of that C of O, and, in *Byrne v. Bd. of Stds and Appeals*, 5 A.D.3d 261, 266, 774 N.Y.S.2d 493 (1st Dep't 2004), the Appellate Division declared the C of O null and void, and concluded that Pelli obtained it "based on false information." *Id.*, 5 A.D.2d at 266, 774 N.Y.S.2d at 497. The court found that Pelli and his architect filed a statement with the Department of Buildings ("DOB") "certifying that all the work that was necessary to bring the building into compliance with Article 7-B of the Multiple Dwelling Law and the 1987 plans had been completed, and [that] a DOB inspector made a similar conclusion, after an alleged November 1998 inspection" even though "none of the required work was actually completed prior to the issuance of the C/O." *Id*. Notably, petitioners had no kitchen sink. The DOB inspector was subsequently indicted for bribe taking, though not in connection with this case.

In addition, Pelli has demonstrated a resistance to following the requirements of the Loft Law in other ways as well, which has been the subject of orders issued by the Loft Board and of post-trial findings and recommendations made by OATH administrative law judges. For example, OATH ALJ Charles McFaul found in 2001 that Pelli harassed petitioners when he "departed significantly from the work described in the narrative statement and plans to the extent that he unreasonably and willfully interfered with the tenants' use of their residence." *Matter of Pelli*, OATH Index Nos. 1195-96/01, at 20 (Feb. 26, 2001), *modified on penalty*, Loft Bd. Order No. 2624 (Apr. 24, 2001), *applic. for reconsid. denied*, Loft Bd. Order No. 2738 (June 25, 2002), *aff'd sub. nom.*, *Pelli v. New York City Loft Bd.*, 5 A.D.3d 268, 774 N.Y.S.2d 492 (1st Dep't 2004) (affirming imposition of $4,500 fine). Even the Appellate Division noted Pelli's reluctance to accede to the authority of the Loft Board's narrative statement process: "Pelli initially admitted to the [Board of Standards and Appeals] that he intended to do the bare minimum work required by the building code, irrespective

of the 1987 plans. However, upon prodding from the panel members, he promised he would complete the work required by the 1987 plans." *Byrne v. Bd. of Stds and Appeals*, 5 A.D.3d at 264, 774 N.Y.S.2d at 495.

ANALYSIS

The Loft Board rule prohibiting harassment, found at 29 RCNY § 2-02(b), defines "harassment" as follows:

> The term "harassment" shall mean any course of conduct engaged in by the landlord or any other person acting on its behalf that interferes with or disturbs the comfort, repose, peace or quiet of an occupant in the occupant's use or occupancy of its unit if such conduct is intended to cause the occupant to vacate the building or unit, or to surrender or waive any rights of such occupant under the occupant's written lease or other rental agreement or pursuant to Article 7-C.
>
> Harassment shall include, but is not limited to, the intentional interruption or discontinuance of or willful failure to provide or to restore services customarily provided in the building or required by written lease or other rental agreement or, for residential occupants qualified for the protections of Article 7-C, by the Loft Board regulations regarding minimum housing maintenance standards. Harassment shall not include either the lawful termination of a tenancy or lawful refusal to renew or extend a written lease or other rental agreement, or acts performed in good faith and in a reasonable manner for the purposes of operating, maintaining or repairing any building or part thereof.

Petitioners assert in a number of allegations, addressed *seriatim*, that Mr. Pelli harassed them during the course of a renovation of their loft unit which consisted of work necessary to legalize the building. Respondent denies the allegations and asserts a defense and a counterclaim against the tenants. I find that the allegations set forth in paragraphs 2, 4, 5, 7, a part of 11 and 12, 13, 31 and 33 establish that respondent harassed petitioners, and that a fine of $5,000 should be imposed therefor. The remaining allegations should be dismissed. I further find that Mr. Pelli failed to establish that petitioners' application was frivolous.

Credibility

An assessment of the witnesses' credibility is critical to fact-finding, and this case was no exception. It was particularly important here because of the subjective nature of many of the accusations. The opportunities to gauge witness credibility were numerous during this trial which lasted seven days over a period of several months. The substantial acrimony between the parties presented a challenge in conducting this trial.

I found petitioners to be extremely vigilant, even paranoid, about Mr. Pelli and his motivations. Although petitioners take the worst possible viewpoint of any given situation involving Pelli, their cynicism is in part warranted by way of a troubling history with him. Perhaps as a result, petitioners hew stubbornly to a single viewpoint (for example, about how their alternate plans must be read) even when there is obvious ambiguity, and they leave no room for compromise. Though petitioners clearly suffered during the course of this renovation, they also made it worse for themselves by engaging Pelli in battle over any issue, no matter how small. Their inability to modulate their viewpoint based on objective information gave me reason to view many of their claims with skepticism.

In addition, Pelli was unable to state objections or give testimony in a concise, non-argumentative fashion, which caused the trial to drag on unnecessarily despite my efforts to cut off peripheral commentary.

Though none of the parties was scrupulously truthful, petitioners' misrepresentations consisted typically of exaggeration. Pelli, however, suffered from more serious credibility problems given the frequency with which he mischaracterized important matters, which was highlighted by flagrant misrepresentations such as the 2-01(g)(2) notice that he claimed to have served (*see* discussion of paragraph 2, below).

For example, Pelli mischaracterized the content of Judge Kapnick's orders, often stating that she had held that petitioners denied him access when in fact she had left that determination to the Loft Board. When forced to admit that Judge Kapnick had ordered petitioners to provide access but had not made a finding that access had been denied under Loft Board rules, Pelli continued to insist on the truth of his position and argued that Judge Kapnick made this representation in colloquy during the courtroom proceedings. There is a substantive difference between colloquy and an actual factual finding, and it is one that Pelli, an officer of the court himself, should be able to make. On the subject of petitioners' requests that he not do work in the apartment on Wednesdays, Pelli asserted that "Judge Kapnick ruled that their Wednesday request not to let me in is completely unreasonable." When challenged, he equivocated saying, "Well, she said that and something to that effect" (IV: 234-35), but the transcript of the proceedings belie Pelli's representation. After asking why petitioners needed Wednesdays free of construction work, Judge Kapnick stated, "So go

somewhere else for one Wednesday and let him finish the work" (Resp. Ex. G, at 7) – a statement that does not constitute a "ruling that their Wednesday request . . . [was] completely unreasonable." I found these misrepresentations, which could be innocent exaggeration if made by a lay person, to be particularly galling as they were made by an officer of the court about a judicial decision.

Pelli also misrepresented information about the availability of the disciplinary status of his master plumber, Morton Chait. The DOB is responsible for licensing master plumbers. Mr. Chait is the master plumber who self-certified the February 5th rough-in inspection (where the plumbing lines beneath the floor and behind the walls is inspected), which was conducted by another plumber, Jay Seery (VI: 187-89). Pelli testified that, after petitioners told him that Mr. Chait was not authorized to self-certify because of his disciplinary status, he told Mr. Sklar to investigate the matter and Sklar reported that he was unable to obtain that information from the DOB ("whether he's been censured and punished and prohibited from self-certifications") without filing a Freedom of Information Act request (VI: 100).

Petitioners produced a document that they obtained from the DOB website on March 5, 2004, which listed Morton Chait under "Disciplinary Actions" and indicated that he was serving five years' probation with a one-year revocation of his ability to self-certify (Pet. Ex. 60; VI: 188-89). Though Sklar claimed to have checked the DOB website, he also said that he was told that this information could only be obtained by a FOIL request (VI: 122-23). He admitted that he had done nothing to ensure that his subcontractors were authorized to self-certify and that he was unaware of the DOB's criteria for self-certification (VI: 123-25). Given the free availability of this information on the DOB website, I did not believe that Pelli and his contractor were merely misinformed about the status and availability of Mr. Chait's record.

The limited integrity of Pelli's representations, which arose repeatedly during trial, greatly undermined his credibility.

The Harassment Application

I. Setting up petitioners to deny respondent access

Paragraph 1 alleges that Mr. Pelli concocted a scheme to set up petitioners to deny him access so that he could then file an access application with the Loft Board. The scheme is alleged to have begun with Mr. Pelli's letter to the Loft Board, dated December 16, 2002, in which he stated his

intention to send an access notice to petitioners and asked the Loft Board for an assessment of the likelihood that his access application would be heard.

In the letter (Pet. Ex. 2), Pelli acknowledged that a number of applications filed by petitioners and then pending before the Loft Board had been stayed while the validity of the certificate of occupancy was being challenged. The letter stated Pelli's preference that all current applications be treated the same, whether stayed or adjudicated, "in the interest of due process," and asked whether an access application filed by him in the future would also be subject to such a stay. Ms. Byrne referred to this as a "legal threat" (I: 34).

I find nothing actionable about respondent's request, and recommend that paragraph 1 of petitioners' application be dismissed.

II. Improper notices, demands and threats

Paragraphs 2 through 10 claim that Pelli sent defective notices to petitioners seeking access to perform work in their unit and/or failed to provide petitioners with required notice, in violation of applicable Loft Board rules. These paragraphs also allege that Pelli's notices contained demands and threats that violate real property law statutes and Loft Board rules.

Section 2-01(g) sets forth the applicable notice requirements for work to be done in regulated IMD units. The rule requires that two notices be sent: the first providing a range of dates when the work is expected to commence (§ 2-01(g)(1)), and a second notice informing tenants of the actual start date (§ 2-01(g)(2)). Specifically, it provides that:

> the owner shall provide all occupants with written notice of the approximate commencement date, duration and scope of all work to be performed within their units and of all common area work that may interfere with access to their units or the provision of services to their units.

For work expected to take more than one working day to complete, the notice must provide a range of five consecutive working days during which work will begin, and it must be served 10 days before the first date in the range (§2-01(g)(1)). The owner must also provide a confirming notice specifying the actual start date "[n]o later than the day preceding the first scheduled day of work" (§2-01(g)(2)).

On December 16, 2002, Mr. Pelli served an access notice on petitioners pursuant to section 2-01(g)(1) (Pet. Ex. 4). The notice indicated that work in the apartment would commence during

the period January 8 through January 14, and that it would be performed consistent with the alternate plans drawn by petitioners' architect. Specifically, the work to be performed was to include:

> 1) Kitchen sink installation, including all plumbing lines (waste, venting, hot and cold water, etc.); 2) Vent bathroom fixtures; 3) Provide new gypsum board wall and ceramic tile at tub surroundings; 4) Provide new bathroom tiled floor and 6 inch tile baseboard; 5) Electrical wires inspected for code compliance and repaired; and 6) Windows examined and measured.

(Pet. Ex. 4). The notice estimated that the work would take five days to complete and that the bathtub and toilet would be inoperable for two days each (though not necessarily the same two days). The notice suggested alternative arrangements that petitioners could make to obtain these services. It also offered petitioners the opportunity to inspect the new kitchen sink and cabinets which were being kept in Pelli's apartment.

This notice fully complied with the requirements of section 2-01(g)(1). The notices that Pelli sent subsequently were problematic, however, as set forth below.

Paragraph 2 alleges that Pelli never served petitioners with a notice confirming the start date of the work outlined in his December 16th 2-01(g)(1) notice, as required by section 2-01(g)(2).

Petitioners testified that they never received the second confirming notice (I: 39, 46).

Pelli testified that he served a timely 2-01(g)(2) notice confirming the start date for the work (VI: 58). He submitted in evidence a letter dated January 7, 2003, which noticed a January 9 start date for the work (Resp. Ex. C). The attached affidavit of service states that Pelli attached a copy of the notice to petitioners' door and mailed a copy to the Loft Board. Petitioners dispute that Pelli ever delivered this notice to them and contend that he submitted a false document to defend against their harassment application here as he did in support of his access application in Supreme Court.[3] Byrne testified that she was working on her dissertation at that time, that she and Connors were home on January 6, 7 and 8, and they never received this notice (I: 53, 204; II: 365). Byrne stated that other letters mailed to the Loft Board were date-stamped a day or two after they were sent, and that this document was suspect in that it was stamped received at the Loft Board on January 13 – nearly

[3]Petitioners expressed outrage at the appearance of this document, which they first saw attached as an exhibit to Pelli's sworn affidavit submitted in support of an order to show cause filed in Supreme Court (I: 203, 214; Pet. Ex. 45) that sought access to their apartment.

a week later (I: 204; II: 366). Loft Board personnel told her that they typically stamp documents when they open them.

It is notable that, despite the substantial acrimony of the parties toward one another and the volume of letters exchanged by them and entered in evidence in this case, the delivery or receipt of no other letter was disputed at trial. I found that distinction to be significant. I also found it suspect that this notice differs notably from other letters and notices sent by Pelli. It is the only notice to which Pelli attached an affidavit of service, as if he expected it to be challenged. Though entitled "affidavit" of service, the document was never sworn before a notary. I did not credit the document or Pelli's testimony about it. Rather, I concluded that Pelli created it after he realized that he had not complied with the notice requirements under section 2-01(g), and he attached the unnotarized affidavit of service to bolster its credibility.

Also, at the time that Pelli claims to have served this notice, petitioners were sending him letters that repeatedly asked for confirmation of the start date and other details about the work that he noticed in his December 16 letter. Petitioners' December 23 and January 2 letters requested further information about the scope and timing of the work to be done (Pet. Exs. 5 & 6), and their January 6th letter confirmed the start date as January 9, rather than January 8 which Pelli had chosen, since they had received no confirmation from Pelli (Pet. Ex. 7).[4]

Byrne testified that, on January 9, she and Connors waited for workers to arrive and she called Pelli at 10:30 a.m. when no one had come. She said that Pelli cancelled the work when she spoke with him and stated to her "you don't get to pick the date; I do." I credited her testimony, which provided a convincing explanation for Pelli's failure to confirm the start date.

---

[4]Petitioners' December 23rd letter(Pet. Ex. 5) asked for (i) the start date (which petitioners proposed as January 9 based on their work schedules), (ii) the scope of the work and numerous other details regarding the work to be done, and (iii) a construction schedule "as to what will be happening and when, so as to prepare and protect our belongings." They made several unreasonable demands including assurance that there would be a fully functioning sink and toilet each day (even though Mr. Pelli's letter clearly stated that they should anticipate some unavailability), and they attached a three-page document supplied by their architect containing contractual requirements for the construction (entitled "General Notes and Conditions") which they expected Pelli's contractor to adhere to "in all respects." On January 2, petitioners wrote again seeking a response to their December 23 letter and indicating they were "trying to adjust our schedules for the construction work" and needed his confirmation (Pet. Ex. 6). Having received no response, petitioners wrote another letter on January 6 "assuming and confirming" that Pelli would start the work on January 9 – their proposed date – and that the work would conform to the terms and conditions they set out in their December 23rd letter (Pet. Ex. 7).

The battle between these parties is nothing if not a struggle for power and control. The tone of the conversation as reported by Byrne indicated that Pelli chafed at the notion of petitioners rescheduling the start date that he had chosen and adding on a number of other demands that, in his view, were not required under the Loft Law. He wanted control, so he exercised it by refusing to confirm the date that petitioners asked for with the required notice. This motivation was suggested in Pelli's own trial testimony characterizing petitioners' December 23rd letter: "They don't say 'please confirm,' they say 'we are confirming. We're basically taking the right that the Loft Board gave you so that you can manage construction, and we're taking that right, because we want to do it our way . . . .'" (I: 52). Moreover, petitioners' habit of letter-writing convinces me that, had Pelli served them with the second notice, they would have responded with another letter asking for further detail of the work to be done.

Thus, I find that the preponderance of the credible evidence established that Pelli failed to serve petitioners with the confirming notice required under section 2-01(g)(2) of the Loft Board rules. Further, by submitting a fabricated document as evidence in this case, Pelli severely undermined his credibility.

The next question is whether Pelli's failure to serve the 2-01(g)(2) notice constitutes harassment. As is demonstrated here and as discussed in the analysis of paragraphs four through 10 below, Pelli failed to provide timely, adequate notice of work to be done on numerous occasions. I conclude that the notice deficiencies addressed in application paragraphs 2, 4, 5, and 7, collectively, evidence a pattern of "repeated [and] substantial violations of the notice provisions" – where Pelli schedules and reschedules the work giving inadequate notice and improperly threatening legal recourse if petitioners do not provide access. This willful course of conduct constitutes harassment in violation of applicable Loft Board rules. *See* 29 RCNY §§ 2-01(g) & 2-01(h). This finding is based upon the cumulative effect of these notices and is not to suggest that any single improper notice constituted harassment.

Accordingly, paragraph 2 of the application is sustained.

Paragraph 3 alleges that Pelli ignored petitioners' letters, dated December 23, January 2, and January 6, which sought confirmation of the start date and failed to provide any confirmation or cancellation of the start date.

As discussed above, Loft Board rules entitled petitioners to receive a single confirmation of the start date of the work, which Pelli failed to provide. Although the several letters that petitioners wrote here dramatize that fact, they do not supply an additional basis upon which to find harassment. Accordingly, paragraph 3 of the application should be dismissed.

Paragraph 4 alleges that Pelli's January 13th notice to start work on January 16, was an improper three-day notice that contained a threat of legal action if petitioners did not comply. Petitioners allege that they considered the title of the letter – "continuing access demand" – a "threat."

On January 13, Pelli sent petitioners his second request for access which also failed to comply with section 2-01(g) (Pet. Ex. 14). The letter, entitled "continuing access demand," notified petitioners that he and his contractor would be at their apartment on January 16 "to begin the job, as further described in the December 2002 2-01(g)(1) Notice." It states that he will seek a court order if access is not provided.

Since this notice does not confirm a start date that is within the five days set forth in Pelli's initial notice (January 8 through 14), it must conform with the requirements of section 2-01(g)(1) anew. *See Matter of Weisfeld, et al.,* Loft Bd. Order No. 2346 (Dec. 29, 1998) (initial notice and confirming notice must refer to the same access date to comply with 2-01(g)). As a new 2-01(g)(1) notice, it fails to give notice of the period during which work will begin, *i.e.*, "a range of five consecutive working days during which work . . . will begin" for a two-day job, or "a range of three consecutive working days" for a one-day job (§ 2-01(g)(1)). In addition, presuming that Pelli was proposing another five-day construction job, he should have provided 10 days' notice instead of three. Lastly, no confirming notice pursuant to section 2-01(g)(2) was sent (I: 79).

It is unlikely that there is any legal meaning to the words "continuing access demand" in this notice inasmuch as the Loft Board rules do not refer to such a term. Petitioners contend that it was meant to intimidate them. Whether it is or not, it does imply that access has been (properly) demanded before and it continues to be demanded here. The evidence established, however, that a proper demand had not been made by this point.

Pelli contends that his letter did not have to comply with the notice requirements of section 2-01(g)(1) because it evidenced a mutual agreement to a start date (*see* II: 417), but that is belied by

Pelli's own words "continuing access demand." The terms "demand" and "agreement" would appear to contradict one another. Also, since petitioners had not yet agreed to the date, the letter could not have been memorializing any agreement.[5]

Pelli claimed that petitioners wanted to negotiate a new access date for January 16 so that he would not take them to court because they knew they had improperly denied him access on January 9: "I think that shows consciousness of guilt essentially," he asserted (IV: 175). This contention too is undermined by the fact that it was Pelli who sought the new date.

I find that this letter evidences harassing conduct intended to coerce petitioners to waive their occupancy rights. The letter purports to be a legal notice but fails to supply many of the requirements of such notices while it simultaneously threatens legal action if petitioners do not heed its terms. I did not find Pelli's conduct to be inadvertent or mistaken. It was obviously meant to intimidate petitioners into doing what they were not required to do, and Pelli, a licensed attorney, knew this. I did not find, however, that the use of the term "continuing access demand" was a threat.

I recommend that paragraph 4 be sustained.

Paragraph 5 makes allegations concerning Pelli's attempt to schedule work in the apartment on January 27 and 28. It alleges that Pelli's January 18 letter sought to schedule only a portion of the necessary work and that a subsequent letter ridiculed petitioners and threatened legal action. It further alleges that, despite petitioners' requests for confirmation, Pelli never sent a notice confirming or cancelling the start date. It also alleges that Pelli ridiculed them in a January 23rd letter.

On January 18, Pelli wrote to schedule work to be done on January 27 and 28; the letter (also entitled "continuing access demand") asks that petitioners confirm the dates (Pet. Ex. 19). This letter failed to comply with the requirements of section 2-01(g)(1) in that it sought to schedule two days' work on less than 10 days' notice. As to scope of work, the notice provides insufficient notice of the extensive work that is to be done – merely indicating that the floor boards will be removed on

---

[5]Connors characterized their acquiescence to the date as a "concession" made after their repeated unsuccessful requests for proper notice, which is consistent with their letter to Pelli accepting the date (IV: 165; Pet. Ex. 15). As evidence that they never intended to waive any rights to proper notice under section 2-01(g), petitioners cite their January 21 letter in which they express willingness to agree to dates for inspections on short notice but explicitly request a set of dates according to Loft Board rules (Pet. Ex. 20).

January 27, and "[t]he plumber will arrive on January 28" (Pet. Ex. 19). Pelli also indicates that he would "try" to get the electrician and window company to come on those two days. Last, Pelli failed to provide a confirming notice. Instead, his letter places the onus on petitioners to confirm, which is not their duty under Loft Board rules. Again, Pelli demonstrates a willful failure to comply with the requirements of section 2-01(g) which, as a part of his calculated effort to intimidate petitioners, constitutes harassment.

Contrary to petitioners' allegation, I did not find sanctionable "insults, ridicule, [or] threats" in Pelli's January 23rd letter, which merely states that one of their accusations against him "borders on the absurd" (Pet. Ex. 23).

Accordingly, paragraph 5 is sustained.

Paragraph 6 alleges that, on January 30, respondent sent the workers home after they demolished the kitchen and bathroom, thus depriving petitioners of the only operable sink in their home – the cast-iron sink in the bathroom. It further alleges that, by letter, Pelli told petitioners to "sit tight" and wait for information on when the demolished areas would be completed.

This paragraph contains no allegations relating to improper notices, demands or threats. The conduct alleged herein is separately addressed in paragraph 28, below. I find that paragraph 6 should be dismissed.

Paragraph 7 alleges that Pelli wrote petitioners on January 31 scheduling electrical work to begin in three days which required demolishing walls in their bedroom; petitioners asked that work in the areas already demolished be completed before demolishing the only remaining livable area in their loft, and Pelli threatened legal action.

This letter also fails to comply with section 2-01(g). The letter notes that the electrician is scheduled for Monday (February 3), which Pelli had previously notified petitioners of on January 30 (Pet. Ex. 32; Resp. Ex. DD), but it fails to provide any duration for the electrical work to be done (*see* § 2-01(g)(1)). Additionally, because the work was expected to include rewiring and demolition, it surely would take more than one day to complete (in fact, it took three: March 3, 4 and 5 (II: 470)). In that case, his three-day notice should have been a 10-day notice that provided the approximate duration of the work.

Though Pelli claims that he was merely trying to keep the work going, his notices were consistently deficient, providing bits of information in a piecemeal fashion but never the whole picture required pursuant to section 2-01(g). I find that the January 31st letter also was a part of Pelli's willful harassment of petitioners. Accordingly, paragraph 7 is sustained.

Paragraph 8 alleges that Pelli deliberately, vindictively and in retaliation selected a Wednesday, February 5, to schedule a plumbing inspection, and has chosen Wednesdays on other occasions despite petitioners' repeated requests that he not do so.

Petitioners' difficulty with Wednesdays is that Ms. Byrne teaches and Mr. Connors conducts music lessons in the apartment on Wednesdays. They have taken the firm and inflexible position that their Wednesdays are not to be disturbed and have refused to reschedule their respective obligations. I find that position to be unreasonable and find no basis upon which to find harassment here. On February 5, in particular, a plumbing inspection would have taken a short time to complete with minimal intrusion to petitioners. This is but one example of a number of excessively rigid positions taken by petitioners during this renovation which undermined the efficiency of its completion, though their unreasonable positions often were matched by Pelli's.

Accordingly, paragraph 8 should be dismissed.

Paragraph 9 alleges that, on February 5, petitioners received a notice taped to their door notifying them that work would resume the next morning; petitioners wrote Pelli indicating that they could not be available on such short (12 hour) notice, but would provide access on February 7 and 8 (Friday and Saturday) so that the bath work could continue. It further alleges that Pelli never confirmed the visit. These allegations were proven by the trial evidence.

By this time, work had last been performed in petitioners' apartment on Thursday, January 30. Though section 2-01(g)(2) provides that "In instances where scheduled work is cancelled, it must be rescheduled in accordance with the provisions of 2-01(g)(1)," the rule does not specifically address the problem of work that starts, stops, and restarts. Petitioners object that Pelli's February 5 letter (Pet. Ex. 35) provided less than a day's notice, which would certainly have been unreasonable under Loft Board rules for an initial notice. Nevertheless, because Pelli was resuming work that had already started and was trying to do so as soon as possible after the inspection and in

accordance with petitioners' many requests, it was not unreasonable, nor should it have been a surprise to petitioners that Pelli expected to restart the work the day after the inspection.

I therefore recommend that paragraph 9 be dismissed.

Paragraph 10 alleges that, on February 7, Pelli hand-delivered a note to petitioners advising them that, unless they "hear otherwise" from him, work would continue day-to-day until complete; petitioners allege that "[t]his type of scheduling . . . wreaks havoc in Tenants' work schedules."

This letter gives petitioners one day's notice that work will commence the following day, February 8, and continue on February 9, 11, and 12 (Pet. Ex. 38). Obviously, it fails to provide the required 10-day notice. Nevertheless, because Pelli was seeking to recommence work that had already begun and to satisfy petitioners' requests for completion, I did not find that his failure to comply with the notice requirements constituted harassment.

Accordingly, paragraph 10 is dismissed.

In total, I find that the failures established in Paragraphs 2, 4, 5, and 7 were intentional, repeated, and willful refusals by Pelli, a licensed attorney, to follow clearly-defined Loft Board requirements to notice the work to be done and that such "repeated [and] substantial violations of the notice provisions" constituted harassment under Loft Board rules. *See* 29 RCNY §§ 2-01(g) & (h), and 2-02. The Loft Board notice rules are intended to ease the burdens of uncertainty both for landlords and tenants so that legalization can proceed in a predictable and efficient manner. *Cf. Matter of Weisfeld,* Loft Bd. Order No. 2346 (Dec. 29, 1998) (as long as the owner takes the required steps, he or she may gain reasonable access for a legitimate purpose). Petitioners cite Pelli's ongoing failure to comply with Loft Board notice requirements (III: 675). *See* Petitioners' Exhibit 55 (January 28, 2002, and January 13, 2003, letters from petitioners to the Loft Board documenting a lengthy history of faulty access notices served by Pelli in 2001 and 2002). This tribunal made the same observation of Pelli in *Matter of Pelli*, OATH Index No. 708/01 (Oct. 30, 2000), *adopted*, Loft Bd. Order No. 2604 (Jan. 23, 2001), where ALJ McFaul found that he failed to comply with access notice requirements by serving notice on the tenants' attorney and by failing to serve a confirming notice pursuant to 2-01(g)(2). Here, Pelli's concerted aversion to submitting to this process and abuse of these provisions created a chaotic atmosphere, as will be further addressed in paragraphs below. His record of refusing to follow notice requirements precedes even this case.

III. Refusal to clarify scope of work and to provide proper schedule

In the many letters cited in paragraphs 11 and 12 of their harassment application, petitioners repeatedly asked Mr. Pelli for detailed information regarding the scope of work and a schedule for the work to be done. They allege that Pelli's failure and refusal to answer these requests constitutes harassment.

The history of the relationship between the parties to this proceeding, noted above, provides some context for the demands made by petitioners and the allegations set forth here.

Paragraph 11 alleges that Pelli's December 16 notice provided only a partial list of work which, despite petitioners' requests for clarification, was never supplemented. It alleges that petitioners sent numerous letters to Pelli asking for clarification and confirmation of the scope and the schedule of work (on December 23, 2002, January 2, 6, 10, 11, 12, 13, 16, 21, 23, 24, and 30, 2003, and February 1, 2, 5, 6, and 10, 2003), and they received none from Pelli. That portion of paragraph 11 which alleges that Pelli failed to respond to petitioners' letter of February 10 should be dismissed because, by that time, Pelli had filed for an access order in Supreme Court which effectively provided his response. Pelli also wrote on February 12 offering to discuss resolution of the issues (Pet. Ex. 46). Moreover, the allegation concerning petitioners' January 24 letter should also be dismissed, as the letter did not ask for a schedule of work to be performed (Pet. Ex. 24). Paragraph 12 alleges that Pelli failed to provide clarification of the scope and schedule of the work in letters sent to petitioners on January 14, 18, 22, 23, and 30. It further alleges that, on February 7, Pelli stated that he would not build a full wall in the bathroom, but would build a box around the vent pipes.

Regarding the scope of work, petitioners say that they wanted to ensure that Pelli was doing the work according to their alternate plans, as he had promised.[6] When they received Pelli's December 16th access notice, they responded in letters seeking detailed clarification of the work that he would perform. Byrne cited her specific concerns as follows (I: 41-46; Pet. Ex. 5): Even though the windows were contained in the narrative statement, Mr. Pelli previously had refused to replace

[6]Byrne stated that, "[I]f we were going to allow the work to happen without the narrative statement plans being determined, we wanted to make sure that we had a solid reason for doing so. If we had not thought that the work was going to be done exactly according to the alternate plans application, we never would've said yes, because we would've just waited for the Loft Board to decide." (I: 40).

the windows as petitioners requested, and they were uncertain whether he planned to do so now because his notice merely stated "[w]indows examined and measured" (Pet. Ex. 4). In the past, Mr. Pelli had insisted on running new kitchen plumbing above the floor boards, rather than beneath them, which led to a finding of harassment against him; petitioners wanted to be sure that the plumbing would be installed below the kitchen flooring, and Pelli's notice did not address this. Petitioners' bathroom plumbing was old and needed to be replaced, but the notice only referred to tiling the floor and venting the fixtures and did not address replacement of the plumbing. Petitioners also wanted to confirm that they would have a working toilet and sink at the end of each work day.[7]

Although petitioners' considerable preoccupation with every last detail of the work has a clear origin, there is no basis for finding that section 2-01(g) requires Pelli to provide the minutely detailed scope of work that petitioners demanded. *Cf. Matter of Byrne*, OATH Index No. 2003/04, at 32-33 (Jan. 14, 2005) ("there can be no requirement that access to the petitioners' premises be conditioned on Mr. Pelli's proof to the petitioners' unilateral satisfaction that he is proceeding within [the DOB's permitting and licensing] requirements"). As a result, I did not find that Pelli's refusals to provide these detailed explanations of how he planned to do the work, or his refusals to adhere to petitioners' suggested schedules for the work, were unreasonable or constituted harassment. Accordingly, those portions of paragraphs 11 and 12 should be dismissed.

This same logic applies to petitioners' allegation that Pelli stated that he would not build a full wall in the bathroom, but would build a box around the vent pipes. As more fully stated in the discussion of paragraph 28 below, Pelli sought to apply a reasonable interpretation of petitioners' plans and therefore was not guilty of harassment.

On the other hand, I find that petitioners' requests for a construction schedule, alleged in both paragraphs 11 and 12, were reasonable due to the fact that this renovation required demolition in all

---

[7] In the prior harassment case, this tribunal concluded that Pelli or his agents "knowingly and intentionally departed significantly from the work described in the narrative statement and plan" and that Pelli unreasonably interfered with the tenants' use of their residential unit "by refusing to install a kitchen sink, as depicted on the plans filed with the Department of Buildings; by refusing to install a ceramic tile floor in the bathroom, as depicted on the plans; by refusing to install a hard-wired smoke detector; by refusing to install six new double glazed windows, as described in the narrative statement and by refusing to install a dishwasher, as depicted on the plans." *Matter of Pelli*, OATH 1195-96/01, at 20. ALJ McFaul noted that the sink that Pelli sought to install in the kitchen "is the type of sink that one would find in a laundry room or institutional setting" – commonly known as a slop sink. *Id.* at 18. Much of the work that Pelli planned to do here had been the subject of the prior harassment action.

three rooms of their loft: the bath, kitchen and bedroom. Inasmuch as section 2-01(g)(1) requires notice of the "duration and scope" of the work, it was reasonable that petitioners be given notice about which rooms would be demolished and/or unavailable to them and when, so they could protect or move their belongings and anticipate the absence of necessary plumbing fixtures. Because I find that petitioners' requests for a notice that provided such information were reasonable and were reasonably related to the requirements of 2-01(g), Pelli's failures to provide such a schedule of work will be discussed here.

After petitioners made extensive requests for information in their December 23 letter, including a schedule of work, Pelli wrote on January 2 to invite them to look at the sink he purchased to install in the kitchen, making no mention of their requests (Pet. Ex. 6). Petitioners wrote again that day, asking for a response to their letter so they could adjust their schedules accordingly (Pet. Ex. 6). Pelli responded on January 6 acknowledging their visit to inspect the sink but made no mention of their requests (Pet. Ex. 7); petitioners wrote again that day and, in the absence of a response from Pelli, sought to confirm January 9 as the start date for the work. Pelli provided no response to petitioners prior to January 9. He testified that he did not respond because the letters were "beating a dead horse and . . . going beyond what the narrative statement process contemplates" (IV: 15-16). He viewed their December 23rd letter "as a trick on [their] part to entrap" him.

After a confrontation with Pelli on January 9, petitioners wrote him on January 10, 11, and 12 offering Pelli access and asking for a schedule of work (Pet. Ex. 13). Pelli responded on January 13 indicating that his contractor would be at the apartment on the 16th "to begin the job, as further described in the December . . . Notice" (Pet. Ex. 14). This letter failed to provide the requested schedule of work.

In their January 13 letter, petitioners offered access and proposed a five-day work schedule which Pelli, in his January 14 letter, does not acknowledge except to admonish them that "construction projects generally have too many unknowns" (Pet. Exs. 15 & 16).

On January 16, petitioners complained that Pelli visited that day for only 20 minutes when they had expected work to begin and asked him again to notify them of the work schedule; Pelli responded on January 18 outlining the work to be done on January 27 and 28. Although he did not acknowledge it, the work that needed to be done was reasonably expected to take more than two days

to accomplish (it took eight work days), so this letter provided no reasonable approximation of the duration of the work (Pet. Exs. 18 & 19; I: 84-85).

On January 21, petitioners again requested a schedule of work and offered "access on short notice for inspections." They also stressed the negative effect that the prior cancellations have had on their income (Pet. Ex. 20). Providing no additional detail as to the schedule in his January 22nd response, Pelli stated, incredibly, "[t]he scheduling of the work in your unit is worked out and has been worked out since I . . . sent out the access demand [on] December 16" (Pet. Ex. 21). He continued: "The detailed schedule that you demand is unrealistic given the uncertainties involved in construction" and referred them to the two-day schedule he offered in his January 18 letter. He then stated that the electrician's work will be completed "within the five day work period" but no such period had been referenced since his December 16th notice; moreover, adherence to that five-day period would be impossible since it (January 8 through 14) had already passed.

On January 23, petitioners wrote asking specific questions about what would be done on January 27 and 28, such as how long they would be without a stove and running water, when the sink would be installed, when the bathroom floor would be taken up – all legitimate questions involving the schedule of work (Pet. Ex. 22). Pelli's response, also on January 23, provided additional detail about what would occur on those two days, but still failed to provide any information about the expected duration of the work (Pet. Ex. 23).

Pelli's workers left on January 30 having completed the rough-in work which involved substantial demolition in two of petitioners' three rooms. Petitioners wrote Pelli on January 30 stating: "We have not received any information from you as to what to expect to happen next. . . . To that end, please provide a clear schedule for [the remaining work]" (Pet. Ex. 27). Pelli responded that day and announced that the electrician would come on February 3 and that the DOB had to conduct a rough-in inspection which had to be scheduled and the plumber would provide them with more information about it (Resp. Ex. DD). The work that remained after the inspection took four days to complete, but Pelli failed to address the duration of the work in his letters.

There is no evidence that Pelli responded to the following letters written by petitioners seeking a work schedule: on February 1, petitioners requested a schedule of work to be done in their bedroom, anxious because the rest of the apartment was demolished (Pet. Ex. 33); on February 2,

irate that they had no sink for the entire weekend, petitioners asked for a schedule and an indication of when they would have a working sink (Pet. Ex. 33); on February 5, having just received Pelli's notice of work that he wished to start the next day, petitioners asked him for a schedule for the rest of the work (Pet. Ex. 35); on February 6, petitioners complained that Pelli never confirmed that he would start the work on February 7, although he copied them on a letter to the Loft Board saying so (Pet. Ex. 37).

In a letter dated February 3, Pelli indicated that the rough-in inspection had just been scheduled (Pet. Ex. 34). The question arises why it took four days after the work was completed on January 30 even to get a date for the inspection. In answer to petitioners' pleas for a work schedule, Pelli states: "I am fairly confident that you will be satisfied once the job is complete. Construction can be frustrating . . . .". Besides advising them of the February 5th inspection, no schedule was forthcoming.

There is no question that Pelli's repeated refusals to answer petitioners' numerous requests for a work schedule was willful. His responses, by and large, were unhelpful, condescending and frustrating. I find that the scheduling information that petitioners requested pertained to the "duration and scope" of the work, and Pelli's continued refusals to provide it was unreasonable and was intended to harass petitioners. Since Pelli's contractor had to arrange for various trades to appear each day, Pelli had to be aware of what work was anticipated and could have passed that information on to petitioners. Petitioners wrote numerous letters conveying their anxiety, which was justifiable given the difficulty of having their entire apartment under renovation. If an estimation of how long the work would take or when it would begin was inaccurate, that would be understandable given the uncertainties of construction. However, in the instances where Pelli did respond, he refused even to provide good faith estimates.

On the other hand, tenants cannot micro-manage the construction process or to demand precisely what work would be done so that they can dispute the prudence or the timing of it, as petitioners sometimes tried to do (*see, e.g.*, Resp. Ex. F). Nevertheless, the tenants should have been made aware when demolition would occur and when necessary fixtures would be unavailable with enough detail to give them notice of the need to move or protect their belongings and to anticipate how to make appropriate allowances. These are reasonable burdens to place upon a landlord because

the burden borne by the tenant in such circumstances is significant. I therefore find that Pelli's repeated, willful refusals to provide petitioners with prior notice of when demolition would occur and when they would be without running water or a toilet constituted harassment of the tenants, and paragraphs 11 and 12 are sustained to that limited extent.

IV. Failure to be ready for work on scheduled days

Paragraph 13 alleges that petitioners confirmed a January 9 start date, but workers failed to appear.

Mr. Pelli did appear on January 9 with Mr. Sklar, his contractor, and the parties had a confrontation at petitioners' door over access. The parties each videotaped the encounter: Mr. Pelli carried his recorder with him (*see* Resp. Ex. D); he is captured by petitioners' recorder which was set up inside the apartment (*see* Pet. Ex. 8). For years, the parties have been engaging in this behavior when they encounter one another over a conflict in the building, according to Byrne, so they can defend themselves against misrepresentations (I: 59).

Byrne testified that on January 9, she and Connors waited in their apartment for the workers to arrive to do the work, and no one showed up (I: 54-57). They were expecting a five-day construction period, according to Pelli's December 16 notice, so they had prepared their belongings expecting demolition to take place. At 10:30 a.m., Byrne called Pelli and asked if the workers were coming. Pelli told her they would not be coming and asked why she thought he was coming to do work that day. He told her to reread the Loft Board rules, because she did not get to pick the date – he did. She complained that he had never confirmed or cancelled the January 8th and 9th proposed start dates. She told him they were ready for the workers and again asked if they were coming. He said no. Byrne then called her lawyer who advised her to write a letter documenting this incident; the lawyer told her that they "had been set up again" (apparently, for an access application). She sent Pelli the letter documenting that they had waited until 10:30 a.m. and no one had come to do the work (Pet. Ex. 9). Five minutes later, Pelli appeared at her door – without the video camera – and told her that the workers were late and were on their way (I:58).

Ten minutes after that, Pelli appeared at the door with Mr. Sklar and his video camera (I: 59). Petitioners allowed Mr. Sklar to enter their apartment, but not Pelli (Pet. Ex. 8; Resp. Ex. D). Sklar had no workers with him, nor did he have any tools; he may have had paper and pencil (I: 62-63).

Petitioners refused to allow Pelli inside their apartment, Byrne said, because he was shooting them with his video camera (they, too, had their video camera running inside the apartment).[8]

Pelli and Sklar left and reappeared at the door minutes later; Pelli continued to demand entry and periodically asked: "you're not letting me in to do the work?" During both visits, Byrne states to Pelli that he had earlier that day cancelled the work during a phone conversation with her. The first time, Pelli denied it, but then said, "well, my contractor is here now" (Pet. Ex. 8). The second time, Pelli was silent (Resp. Ex. D). Petitioners were visibly annoyed and expressed certainty that they were being manipulated by Pelli whom they believed had not come to do "serious business." Pelli's only description captured on tape of the work to be done is that "we need to take some measurements" (Resp. Ex. D). This is not inconsistent with Sklar's representation that he was there to "verify[] field conditions, compile material list, etc" (Pet. Ex. 10).

Later that day, Pelli wrote petitioners a letter stating that the workers were there and needed access to the apartment (Pet. Ex. 10; I: 69-70). Petitioners faxed Pelli a letter instructing him to "send them up," but no one ever came. Later that afternoon, petitioners delivered another letter to Pelli confirming that no workers appeared that day (Pet. Ex. 11).

The petition alleges that the workers "failed to appear," and that this failure constitutes harassment. Mr. Sklar appeared, however, and was there, according to his representations, to begin the work (Pet. Ex. 10; VI: 113). Although the other workers did not appear – and the evidence was not convincing that they were even scheduled to appear that day – petitioners were not entitled to determine unilaterally that Sklar's solo appearance was a ruse and refuse to let him or Pelli in on that basis. I find that Sklar's appearance at the loft that day was to start the proposed work and that petitioners would have been obligated to give him and Pelli access, had Pelli served the proper 2-01(g) notices. The failure of other workers to appear was not harassment.

I find, however, that Pelli's conduct did constitute harassment. Pelli failed to confirm January 9th as the start date for the work despite the section 2-01(g)(2) notice requirement and petitioners' requests for confirmation. He then cancelled the work during that morning's phone call

---

[8]Contrary to Byrne's testimony (I: 61-62), the video tapes do not corroborate her testimony that petitioners told Pelli why he was not allowed in. At the very end of the tape just before Pelli leaves, though, Connors objects to being recorded (Pet. Ex. 8).

with Byrne, but minutes later – while videotaping the incident, as if gathering evidence – he insisted that January 9th was the appropriate start date and that he had not cancelled the work that morning, and demanded immediate access. This conduct was in bad faith and was intended to cause petitioners such consternation and inconvenience that they would relinquish their protected occupancy rights to their IMD unit.

Accordingly, I find that paragraph 13 is sustained.

Paragraph 14 alleges that Pelli sent an improper three-day notice on January 13 scheduling work to begin on January 16, that Pelli and the contractor appeared on January 16 without workers and only conducted a 20 minute inspection, and that Pelli told petitioners that he would not be starting work that day or the next and he did not know when work would start.

On January 16, Pelli, his contractor, and his plumber arrived at petitioners' apartment, conducted a 20-minute inspection and left (I: 81). As they left, Pelli told petitioners that no work would be done the following day, and he would notify them when it would recommence (Pet. Ex. 18).

Pelli testified that Mr. Sklar, his contractor, surprised him with the news that he would not start the work that day (VI: 69). Sklar confirmed that he had given Pelli this information only that day (VI: 117).

Petitioners did not prove by a preponderance of the evidence that Pelli's failure to start the work on January 16 was harassing conduct. Pelli's testimony that his contractor surprised him was uncontroverted, and there was no independent evidence that the cancellation was intentional. Accordingly, paragraph 14 should be dismissed.

Paragraphs 15 and 16 relate to the work in petitioners' loft that was left incomplete on January 30. Paragraph 15 alleges, among other things, that the workers began work on January 27 that continued through January 30, and that Pelli dismissed the workers leaving petitioners without a functioning sink.

These factual allegations are true. There was no dispute that the workers started the work on January 27 and stopped on January 30, before it was completed. It is undisputed that, before the work began, petitioners had an oversized cast iron sink in their bathroom and that, when the work stopped, petitioners had no working sink anywhere in the apartment.

Byrne testified that, on January 27, the workers arrived, put up plastic sheeting and pulled up the floor boards; on January 28, they pulled up the bathroom floor and laid the plumbing for the kitchen sink; on January 29 (a Wednesday), no work was done at petitioners' request; on January 30, five or six plumbers came and did all the plumbing (I: 93-94). Byrne said that she asked Mr. Sklar on January 30 when the project would be completed, and he told her that he expected to have all the plumbing completed that day and an inspector would be coming the following morning (January 31), so they would have the plumbing closed up by the weekend. Connors said that he heard Sklar say the same thing (IV: 60, 181). Mr. Sklar said he did not recall whether he discussed the rough-in inspection with petitioners (VI: 120). I credited petitioners' testimony which was consistent with a letter they sent to Pelli on February 2, 2003 (Pet. Ex. 33).

Pelli testified that the delay in work from January 31 to February 5 was caused by the rough-in inspection (VI: 82). The rough-in work was completed on January 30, he said, and they could not call for an inspection before then (VI: 75). He said that he received word on February 3 that DOB scheduled the inspection for February 5th and immediately delivered a letter to petitioners notifying them (VI: 98). He assumed that his contractor got the earliest date available because he told him to get the job done as quickly as possible. Sklar said the plumber called for the date, but he did not say when (VI: 120).

Petitioners believe that the rough-in inspection was scheduled for January 31st, as Sklar said, and that Pelli rescheduled it for March 5th, purposely pushing back the date and selecting a Wednesday to make it difficult for them. Byrne testified about her belief that a plumbing inspection was simple to set up based upon her review of the DOB website which allowed individuals to schedule their own inspections there. However, her testimony did not explain the process in detail (II: 478). Mr. Sklar testified that the date for the inspections was chosen by the DOB and was out of their control, and that plumbers were not allowed to call for an inspection before the work was actually completed (VI: 120-21).

The mere fact that the work stopped to await a required plumbing inspection is not a basis for establishing harassment. Petitioners' speculation that the inspection was rescheduled intentionally to inconvenience them was not supported by evidence (IV: 188), and Ms. Byrne's

testimony about the DOB website was not substantial enough to prove that this was an intentional act of harassment.

Petitioners make further claims of harassment relating to the length of time that it took to restart and complete the work, which are addressed in paragraph 31, below.

Paragraph 15 also makes allegations about Pelli's treatment of petitioners' bathroom sink. On January 30, the workers removed petitioners' cast iron sink from the wall in the bathroom and destroyed the attached cabinet that helped support it (I: 94-95, 101-06). Petitioners claim that the workers did this intentionally and at Pelli's request. Petitioners also contend that their alternate plans never called for the destruction or replacement of this sink and that they very much wanted it reinstalled. They asked the workers to prop it up on two by fours so they could use it, and the workers said they would need permission to do so. The workers had positioned new vent lines where the sink had been, thus blocking the brace that had supported the sink. When Connors objected to Sklar and Pelli, they both ignored him, and, at 4:00 p.m., Pelli told the plumbers to go home as the sink sat on the floor (I: 120; VI: 61-62).

Pelli contends that he did not intend for the sink to be destroyed and that he had nothing to do with it (VI: 80-81). He said that he offered petitioners a new sink and they refused it.

The evidence established that the cast iron sink had been attached to a work cabinet that was destroyed when the workers removed the sink from the wall. Pelli described the sink itself as "rotten," Byrne said it was merely stained. Since the plumbing was there, Connors believed that the sink could have been propped up temporarily during this period (V: 107), but Pelli chose not to do so. Connor testified that the sink was valuable to him because of its height and he still missed having it (IV: 192). It was not disputed that Connors paid for the apartment fixtures years ago, including the sink. During negotiations with Mr. Carl Wisotsky, the referee appointed in the Supreme Court access case, petitioners eventually agreed to have a new sink installed.

Other than their own speculation, petitioners provided no independent evidence that destruction of the cabinet was intentional or was caused by Pelli, or that the failure to rebuild the cabinet and reinstall the sink was detrimental to them. *See Matter of Kasher v. BLF Realty Holding Corp.*, OATH Index No. 262/99 (Oct. 26, 2001), *adopted in part, rejected in part,* Loft Bd. Order No. 2704 (Feb. 7, 2002) (harassment does not include "acts performed in good faith and in a

reasonable manner" (29 RCNY § 2-02 (b))). Since the destruction of the sink cabinet was not anticipated, Pelli was not responsible for having in place a plan to reinstall a sink that day. Moreover, installation of a sink that day was impossible since petitioners insisted upon the old one and Pelli's plan for reconstruction of the wall did not provide sufficient strength to support that sink, and I did not find sufficient evidence that the sink could have been temporarily installed.

I found no basis for a finding of harassment in the treatment of petitioners' cast iron sink.

Paragraph 16 alleges that when no workers appeared on January 31, petitioners wrote Pelli to ask that the work continue. It further alleges that Pelli refused to tell them when work would continue and advised them to "sit tight."

Pelli wrote telling petitioners that he was awaiting word from the DOB to schedule the rough-in inspection and that his contractor would resume the work after that; he told them to "sit tight" (Pet. Ex. 28). The evidence showed that Pelli told them the work would recommence after the inspection and the date of the inspection had yet to be selected by the DOB. Pelli's failure to continue the work when they had to await an inspection does not constitute a basis for finding harassment.

Accordingly, paragraphs 15 and 16 should be dismissed.

Paragraph 17 alleges that, on February 7, Pelli and his workers refused to advise petitioners of the scope of work.

During a confrontation at petitioners' apartment captured in testimony and on tape on February 7, petitioners denied access to their apartment to Pelli and his contractor to resume the work (Pet. Ex. 39-A). Petitioners say they denied them access because they were given inadequate information describing the scope of work. On the tape, Byrne can be heard demanding details about whether the walls behind the toilet and bathtub would be demolished and replaced, which she desired, or whether new walls would be placed in front of the old ones. Byrne insisted that the toilet would have to be moved forward a few inches so that the wall behind it could be studded. Pelli said that moving the toilet was unnecessary and expensive. Sklar said that removing the wall and moving the toilet were not required by petitioners' plans (VI: 135).

Petitioners' demands may be guided by the access and harassment findings upheld in *Matter of Pelli*, OATH 1195-96/01, *supra*, where petitioners were not in violation of access requirements

though they refused Pelli access to do work, because that work "departed significantly" from the work required by the narrative statement and plan. *Id.* at 10. Petitioners have demonstrated no significant departure here. Hence, the facts are more analogous to those cited in *Matter of Byrne*, OATH 2003/04, *supra*, where the tribunal found that petitioners' demands were excessive: "there can be no requirement that access to the petitioners' premises be conditioned on Mr. Pelli's proof to the petitioners' unilateral satisfaction that he is proceeding within that Department's requirements." *Id.* at 32-33. Thus, I find that petitioners were not entitled to the details they demanded from Pelli and his workers.

Here, the question is whether Pelli's refusal to provide the additional information constitutes harassment, and I find that it does not. Accordingly, paragraph 17 should be dismissed.

V. Misrepresentations to City agencies about petitioners, in violation of RPL statutes

In paragraphs 20 through 23, petitioners allege that respondent made misrepresentations about them in letters to city agencies in violation of the Real Property Law.[9] Paragraph 43 alleges that respondent "continued to send" letters to agencies and to courts in an attempt to prejudice them against petitioners.

Paragraph 20 alleges that Pelli made misrepresentations in a January 13 letter that was copied to the Loft Board. In an undated letter from Pelli to the Loft Board and to OATH ALJ McFaul, Pelli claims that petitioners denied him access on January 9th and he makes two representations that petitioners contend are false – that petitioners closed the door on him that day, and that he sent them a timely 2-01(g)(2) notice (Pet. Ex. 12; I: 73).

Pelli's letter states that "After a brief conversation, the Tenants denied me access to their unit by shutting the door while my contractor and I were standing outside talking with them." The videotaped evidence established that petitioners did close the door on Pelli that morning when he attempted to enter the apartment (*see* Pet. Ex. 8; Resp. Ex. D). Therefore, this was not a misrepresentation.

---

[9] Byrne claimed the law was violated by Pelli's "lying with the intent to influence behavior" when he sent these letters to the Loft Board and to the corporation counsel's office (I: 73). Petitioners did not cite a provision of the Real Property Law.

The evidence also established that Pelli failed to send petitioners a 2-01(g)(2) notice, as discussed in paragraph 2, above. Therefore, Pelli did misrepresent this fact. Pelli's letter also fails to indicate, as the trial evidence established, that Pelli had told petitioners earlier that morning that he would not be starting the work that day. The question is whether Pelli's misrepresentation constitutes harassment, and I find that it does not. Though patently false, the statement was litigation posturing, intended to position Pelli in the next legal proceeding. I did not find in it an intent to deprive petitioners of their occupancy rights.

Accordingly, paragraph 20 should be dismissed.

Paragraph 21 alleges that Pelli misrepresented Mr. Connors in a letter dated January 31 that was copied to the Loft Board. In the letter, Pelli writes that "Bill asked some questions today in a very aggressive, rude manner and I just won't deal with him if he is uncivil or threatening." (Pet. Ex. 28). Byrne testified that Pelli misrepresented Mr. Connors, who was expressing concern about their being left without a sink on January 30 (I: 130-31). Petitioners did not prove that these very subjective statements were false.

Accordingly, paragraph 21 should be dismissed.

Paragraph 22 alleges that Pelli falsely stated in a letter to the Loft Board on February 6, that Inspector Squaw had inspected petitioners' loft and had not issued any violations, when Inspector Squaw had not in fact visited the apartment. It further alleges that Pelli falsely stated that petitioners were notified of work to be conducted on February 6.

In the letter to the Loft Board, Pelli did misrepresent that Inspector Squaw visited petitioners' apartment on February 5 and did not issue any violations (Pet. Ex. 37). Byrne testified that Inspector Squaw did not visit their unit, and she was unaware if he visited the building at all (I: 170). Byrne called this "a completely egregious misrepresentation" and wrote the Loft Board to deny it (Pet. Ex. 37). When she later spoke to Inspector Squaw, on February 7, he indicated that he had been in the building that day, though not in her unit (I: 198; Pet. Ex. 40).

Pelli's letter also stated that his workers reported for work on February 6 and that petitioners refused to let them in even though they were at home. His letter stated that petitioners were "fully aware that this job was to continue day-to-day until complete, subject to DOB inspections, etc." These statements were all intended to mislead the Loft Board. Byrne emphasized that they could not

give Pelli access on February 6 because they received insufficient notice – facts that the letter fails to reveal. Having received Pelli's February 5th notice late that night indicating that work would continue on February 6th, petitioners immediately delivered a letter to him indicating that they would not be available on February 6th but would be available on February 7th and 8th (I: 169-70; Pet. Ex. 37).

I agree that Pelli misrepresented that petitioners denied him access, when, in actuality, Pelli served a last-minute notice that did not entitle him to access. Pelli had refused several previous invitations by petitioners to supply them with a date when the work would resume. His statement that petitioners were "fully aware" that work would continue day-to-day had absolutely no basis since his prior notices were imprecise and unreliable. As in the preceding paragraphs 20 and 22, I found these statements to be purposed for litigation. Since the Loft Board adjudicates these claims, and petitioners have the ability to answer Pelli's false claims and to litigate them if necessary, I concluded that any potential effect upon petitioners would be attenuated.

Although these representations are false, I did not find them to constitute harassment.

Accordingly, paragraph 22 should be dismissed.

Paragraph 23 alleges that Pelli falsely represented that petitioners refused him access on February 7 and threatened legal action in a letter copied to the Loft Board.

After the February 7th incident described in paragraph 17, above, Pelli sent the Loft Board a letter that petitioners claim falsely accused them of denying him access. Pelli's letter states that petitioners refused his contractor access that day and the previous day and that, given their refusals, he is exploring his legal options (Pet. Ex. 40).

Shortly thereafter, Byrne received a phone call from Inspector Squaw who said that Pelli wanted to return and do the work according to petitioners' plans (I: 194). Byrne agreed and Sklar appeared 20 minutes later. Sklar told her that he could not tell her what work he was going to do that day, and petitioners denied him access (see Pet. Ex. 40, p. 2; VI: 139). Since I have found that petitioners did deny Pelli access that day, in paragraph 17 above, there was no misrepresentation.

Accordingly, paragraph 23 should be dismissed.

Paragraph 43 alleges that respondent "continued to send letters to agencies and courts that misrepresented Tenants' actions, in an attempt to prejudice those agencies and courts against

Tenants." This appears to be a catchall paragraph which – absent information about which letters and misrepresentations were made – is insufficiently specific to give proper notice to respondent about the claim. Therefore, paragraph 43 should be dismissed.

VI. Taunting petitioners in the hallways

Paragraph 24 alleges that, on January 31, petitioners called the Loft Board and complained that their home had been left demolished with no sink and asked for an inspection; the inspector said he could not come and suggested they call the Fire Department. It further alleges that, later that day, when Byrne was in the hallway, respondent twice blocked her and taunted her by asking if she was waiting for the Fire Department and if she "had a sink yet," and that later, as a guest arrived, respondent entered the hallway again and asked the guest if he was from the Fire Department. This conduct, petitioners allege, was "frightening and threatening" to them.

Byrne testified that, when she realized that the workers had left their apartment in a demolished state, without a sink, and with no word of when the work would be completed, she called the Loft Board, the Department of Buildings, and her architect (I: 132-34). The Loft Board inspector, Inspector Squaw, told her he did not have time to visit and advised her to call the Fire Department. She called the DOB and was told by an employee who checked their computer system that Pelli had no permit for the work being done.[10] Later that day, Pelli blocked Byrne as she tried to pass him in the hallway. He looked at her and asked "Is the Fire Department here yet?" She squeezed by him. A couple of hours later as she went to take out the garbage, he did the same thing, blocked her and asked about the Fire Department. He also asked, "Got a sink yet?" She squeezed by again. Later that afternoon, a representative from the architectural firm hired by petitioners came to make a report about the conditions in the apartment. She went into the hallway to meet him and heard Pelli ask him if he was from the Fire Department. When they went out with the representative to review the work, Pelli approached again and asked if he was from the DOB.

Pelli confirmed that he saw Byrne in the hallway three times that day, once with her architect (VI: 83-84). He said he received a notice from Inspector Squaw that the Fire Department was

[10]This issue was later resolved in Pelli's favor. Though the DOB issued a stop work order for the lack of a permit on January 31, the order was dismissed when a proper permit was discovered (*see* Pet. Ex. 31 & Resp. Ex. EE). Petitioners dispute that proper permits were issued and contend that the absence of such permits is the real reason why work stopped in January and did not resume until late March.

coming and he wanted to make sure his version of events was represented so he opened the door whenever someone entered the hallway to see who was there. Whenever he confirmed that a Fire Department official was not present, he returned to his apartment. He denied speaking to Byrne or blocking her. He denied asking if she had a sink yet. He did speak with someone from petitioners' architect's firm when he thought he was from the Fire Department.

Though Pelli admits that he entered the hallway three times that day at the same time that Byrne did and that he was concerned about the Fire Department coming to inspect, he denied the rest of Byrne's allegations. In light of the parties' acrimonious relationship and Pelli's observable pleasure during trial when making petitioners uncomfortable, I credited Byrne's testimony that Pelli asked if she had a sink yet, obviously to signal his glee about their predicament. Given the degree of exaggeration evident in Byrne's testimony about incidents that she found intimidating,[11] however, I did not find her testimony to be sufficient evidence that Pelli blocked her in the hallway in an intimidating manner. Although I found his conduct to be intentionally annoying, I did not find that it was menacing or constituted harassment as defined under the Loft Law.

Accordingly, I find that paragraph 24 should be dismissed.

VII. Physical threats by landlord and his workers

Paragraph 25 alleges that the workers refused to pause their work when asked to do so by Mr. Connors so that he could clarify the scope of the work; when they refused, he ordered them to leave and they refused to leave.

Mr. Connors testified that, when he realized the bathroom sink was being removed from the wall, he told the workers to "[h]old on while I find out what's going on," and they told him they did not care what he wanted (IV: 61). Nevertheless, petitioners did not hire the workers and cannot tell them what work to do in the apartment; the workers are accountable to the contractor and to Pelli, who hired them. Therefore, their failure to stop work at petitioner's insistence is of no moment here. Moreover, Connors did not testify that the workers refused when he instructed them to leave.

Accordingly, paragraph 25 should be dismissed.

---

[11] The tape recording of the February 7th incident captures some of this exaggeration (Pet. Ex. 39-A). Byrne also testified that for every five-to-fifteen minute scene at the door, she lost five or six hours of work on her dissertation because of her loss of concentration (III: 679).

Paragraph 26 alleges that the workers harassed petitioners on February 6, by telling them they had to let them in to do work that day, where it had not been properly scheduled.

Byrne testified that, as they were leaving their apartment on February 6, around 9:30 a.m., she and Connors encountered the workers coming up the stairs (II: 296; IV: 64). One of the workers said to them, "You have to let us in. We're here to do work today." Byrne said that the men crowded them near their front door, and as they descended the stairs "surrounded" them and "herded" them down the stairs (two in front of petitioners and one behind). This encounter made her feel creepy and "quite nervous." She admitted that she never complained of it to Pelli or Sklar, nor did she mention it in correspondence she sent to the Loft Board the next day (II: 491-92, 497; Pet. Ex. 37). She also admitted that she had no evidence that Pelli told the workers to harass them (II: 490). Having said that, it is possible that these workers, who were no doubt accustomed to hearing Pelli complain about the tenants denying him access, which he freely did even when he had not complied with the legal prerequisites to access, harbored resentment against petitioners having been led by Pelli to believe that all of the work disturbances were petitioners' fault. Even Mr. Sklar expressed his opinion that petitioners simply did not want the legalization work to be completed. Nevertheless, this speculation about their opinions does not support a claim of harassment. There was no evidence that Pelli caused the encounter.

Pelli disputed that petitioners were actually in fear and pointed out that they did not mention fears of physical threats or intimidation in papers they submitted in the Supreme Court action before Judge Kapnick (*see* Resp. Ex. S). Notably, the harassment application omits these allegations as well.

While menacing behavior has been sustained as harassment, I did not find sufficient evidence of it here. Although petitioners were made uncomfortable by the encounter, I was convinced that their fears were exaggerated. *See Matter of Rebo,* OATH Index Nos. 924/03 & 926/03, at 34 (Dec. 18, 2003) (ALJ found that tenant's testimony about dog menacing her in elevator was too subjective in nature to warrant a conclusion that the landlord intended his dog to menace her). Their tendency to exaggerate has already been noted. Although petitioners were made uncomfortable by the encounter, I was convinced that their fears were exaggerated. Their tendency to exaggerate has already been noted.

Accordingly, paragraph 26 should be dismissed.

Paragraph 27 alleges that, on February 7, respondent repeatedly instructed his contractor to barge in past petitioners to do whatever work he wanted, which frightened and intimidated petitioners.

Byrne testified that, on February 7, she told Pelli that he could come in so long as he told her what work he intended to do (I: 185). She testified that, as she stood in the doorway, Pelli told the contractor to just come in and do the work (I: 187). In addition to hearing Pelli urge Sklar to "barge in," Connors said he saw Pelli gesturing in the same manner (IV: 66). Byrne said she was very frightened by these words, and she flinched and stiffened when he said them (II: 516). She said both she and Connors were "freaked" by it. On cross examination, she also admitted that she had a discussion with Inspector Squaw of the Loft Board shortly after this encounter and never mentioned it to him (II: 520).

Petitioners presented an audio tape recording of the events of February 7 (Pet. Ex. 39-A). On the tape, the discussion between Byrne and Pelli can be heard with Mr. Sklar in the background. Byrne repeatedly asks Pelli: "Are you going to do the work you're supposed to be doing?" And Pelli repeatedly asks: "Are you going to let us in to do the work?" At a point near the end of the conversation, Pelli says to Sklar and then to Byrne: "Michael, come on in and do the work in the apartment. Are you going to let him in?" Byrne challenges him about what work will be done, and Pelli then says, "Michael just go in. I'm not talking about this right now. If they let you in, they let you in; otherwise, I'll be in court."

Although Pelli's statements initially instruct Sklar to enter the apartment, as if without permission, Pelli quickly follows with a statement indicating that permission is required ("Are you going to let him in?" and "If they let you in, they let you in; otherwise, I'll be in court"). Pelli's tone is not menacing. Moreover, there was no evidence that Sklar would actually enter the apartment while Byrne stood in the door; in fact, petitioners had a rather amicable conversation with Sklar immediately following the dispute with Pelli, which is also captured on the tape. Though Byrne claimed that she was frightened and intimidated by these words, I did not find her credible as the tape does not corroborate her claims. Moreover, her subjective belief is insufficient on its own to prove harassment. *See Matter of Rebo,* OATH 924/03 & 926/03, at 34.

Accordingly, paragraph 27 should be dismissed.

VIII. Petitioner's loft was left demolished without a working sink

Paragraph 28 alleges that, after instructing his workers to leave on January 30, respondent did not attempt to finish the work until eight days later, leaving petitioners' home without a working sink, the kitchen floor ripped up, the kitchen unusable, and holes everywhere. It further alleges that, when Pelli returned on February 7, he stated his intention to renege on his previous promises regarding the scope of work, which was his plan from the start ("to ruin not only Tenants' 'comfort, repose, peace or quiet' in their home, but to ruin their home as well"). It also alleges that, on February 10, petitioners sent Pelli a letter asking him to return and finish the work, and he did not reply.

The credible evidence established that petitioners' apartment was left in shambles on January 30. Petitioners' uncontroverted testimony indicated that after the floor boards were pulled up on January 27, they had to step over exposed beams and through holes in the floor, covered in dust, to make use of the kitchen for food preparation (I: 121-22). They either walked or jumped across the beams to get around. They had no sink. Petitioners seek to prove that Pelli intentionally caused this condition, which existed from January 30 to February 7.

The February 7th encounter between the parties is more fully discussed in paragraphs 17 and 27, above. Byrne testified that she knew that Pelli was reneging on the scope of the work when he told her that he would not demolish the wall behind the toilet (I: 192-93). She believed his intent was to mislead them by sending double messages about doing the work according to their plans. Byrne believed that Pelli provoked a situation where he could claim that petitioners had denied him access in order to bolster his credibility in the two legal appeals pending before the Appellate Division at that time – one involving the validity of his certificate of occupancy and the other involving a prior harassment claim (I: 199-200).

Pelli testified that, when petitioners asked him to complete the bathroom first, he turned to that task even though he knew it would take longer to get the bathroom sink operational, because the tile had to be laid and the walls built first (VI: 103-04). He said that but for the tenants' denial of access on February 6, the kitchen sink would have been installed that day (VI: 101), although the

invoice he produced documenting the cost of the workers who were turned away that day indicated payment to carpenters, not plumbers (Resp. Ex. GG).

As set forth in the discussion of paragraph 15, above, petitioners failed to prove that the delay from January 30 to February 5, the date of the inspection, was caused by Pelli's bad faith. Further, as discussed in paragraph 9, Pelli offered to return to do work on February 6th and 7th, immediately after the inspection, and thus did not cause delay at that time. Accordingly, I did not find Pelli at fault for the delay from January 30 to February 5.

Moreover, I did not find that Pelli declared an intention to "renege" on earlier promises about the work. What petitioners describe as Pelli reneging on prior agreements (I: 197) is actually their dispute about what their alternate plans called for him to do. Pelli said that he would do the work according to their plans, and I have found his interpretation of the plans to be reasonable, as discussed in paragraph 29, below. Therefore, this allegation does not state a basis for a finding of harassment.

Petitioners' February 10 request that Pelli return and complete the work is beside the point. After they denied him access on February 7th, he prepared a legal action seeking access and filed it on February 10, which effectively communicated his response to the request. He also wrote them letters on February 12 and 18 offering to discuss resolution of the issues (Pet. Ex. 46).

Accordingly, paragraph 28 should be dismissed.

Paragraph 29 alleges that respondent engaged in a premeditated deception that "entrapped" petitioners by promising to do certain work while planning to do something else, and that Pelli then coerced them into accepting less than their alternate plans provided. It further alleges that respondent refused to do minimally acceptable work "always attempting to aggravate and provoke Tenants so as to further entrap in a scene of its own making," and that the harassment reached a physical level that caused petitioners to fear for their safety. The paragraph itself is so exceedingly conspiratorial in language that it is difficult to read as a legal claim.

This allegation is informed by the petitioners' same contention about the scope of work (paragraphs 11, 12 and 17): that they entered into an agreement with Pelli to do the work according to their alternate plans which were not yet approved by the Loft Board and they want to use the Loft Board to enforce that agreement. Their dispute over the plans, as articulated in this paragraph, could

be read as either a claim of breach of the contract or fraud in its inducement ("promising . . . while planning to do something else"). Their contention fails to prove that Pelli harassed them.

It is undisputed that the parties agreed that Pelli would do the work according to petitioners' alternate plans and that the work did not comport with petitioners' reading of those plans (II: 508, III: 534, 595). Pelli claims that the work he did is consistent with the plans. The record establishes that the parties had a dispute about what those plans required, and the differences amounted to reasonable differences in interpretation. Petitioners' interpretations may have been more attractive and more costly than respondent's, but the work that was done was reasonably consistent with the plans. Despite the numerous photographs of the apartment's condition at various stages – before the work, during the work, and after the work – petitioners did not prove that the work was not "minimally acceptable," or was "less than" that provided in their alternate plans.

For example, the plans state as follows: "Walls of bathroom are deteriorated. Provide new gypsum board wall and ceramic tile at tub surroundings" (Pet. Ex. 1). Petitioners believed that the new wall to be built behind the sink required the old wall to be demolished and rebuilt, and rebuilt sturdy enough to accommodate their old cast iron sink; that is a reasonable interpretation of the plans. So is Pelli's cheaper, less attractive solution to simply build over the old wall and to provide a new sink, even though that option prevented reinstallation of the old sink. *See Kasher v. BLF Realty Holding Corp.*, OATH 262/99 (harassment does not include "acts performed in good faith and in a reasonable manner" (29 RCNY § 2-02(b))). The plans do not mention the bathroom sink except as a fixture for which new concealed vents are to be installed. The plans did not anticipate the destruction of the sink cabinet which created the dilemma of what to do with the old sink, and petitioners did not prove that the destruction of the cabinet was intentional or that Pelli's solution of installing a newer, smaller sink constituted harassment or was a part of a conspiracy to deceive petitioners. I did not find Pelli's interpretation of the work to be unreasonable.

As discussed in paragraph 17 above, where the work that the owner plans to do does not "depart[] significantly" from the work in the plans and narrative statement, petitioners cannot deny access and then squabble over whether the work to be done suits them. In *Matter of Pelli*, OATH 1195-96/01, *supra*, the tribunal found that petitioners did not violate access requirements when they refused Pelli access to install in their kitchen a "free-standing commercial sink with exposed

plumbing," commonly known as a slop sink, because Pelli "departed significantly" from the work required by the narrative statement and plan. *Id.* at 10. By contrast, the work contested here was no significant departure from the plans. Thus, I found no harassment.

I also found no credible evidence of physical threats or intimidation here. In sum, I find that paragraph 29 should be dismissed.

Paragraph 30, which states that petitioner is attaching an exhibit to its application, does not state a claim for relief. Accordingly, it should be dismissed.

IX. Interruption of services and violation of minimum housing standards

Paragraph 31 alleges that petitioners were forced to use their bathtub to brush their teeth and wash their dishes for two months while their loft remained in a demolished condition and the new kitchen sink sat in the building waiting to be installed.

The facts that petitioners' loft remained in a demolished condition, from January 30 to March 28, 2003, and that they had only one source of running water in their loft, from their bathtub, are not contested. The toilet sat on an unstable piece of flooring and wobbled whenever they used it, and petitioners had no sink. Since January 27 when the floor boards were pulled up, petitioners had to step or jump over exposed beams and through holes in the floor to get around (I: 121-22). After a couple of weeks, petitioners wrote Pelli asking if they could use the plywood boards in the hallway to cover the holes in the floor, but he did not respond. The questions are whether Pelli bears the responsibility for the fact that petitioners' loft remained in this uninhabitable condition for the two-month period, and, if so, whether his acts were intended to force petitioners to surrender their protected occupancy rights.

After the February 7th confrontation in which petitioners denied access to Pelli and his contractor, the parties all filed court actions. Byrne said she heard nothing from Pelli for the next several days until she filed her harassment application with the Loft Board on February 11, 2003 (I: 198-99). Pelli filed an order to show cause seeking an access order in New York Supreme Court on February 10, which he served on petitioners on February 12 (I: 214; Pet. Ex. 41). In his papers, Pelli indicated the apartment was in a dangerous condition that "pose[d] a threat to the safety and welfare of the building and its occupants" (Pet. Ex. 41).

The order to show cause was heard by Justice Barbara Kapnick on February 26, 2003, after which Judge Kapnick ordered petitioners to provide access so the work could continue (Resp. Ex. E). Judge Kapnick also appointed Special Referee Carl Wisotsky, whose responsibility was to facilitate completion of the work, and ordered him to appear at the premises on March 3 (Resp. Ex. X). Since I have found that petitioners should have provided access on February 7, Mr. Pelli cannot be faulted for the delay involved in processing the access application, February 7 through March 3.

Work recommenced on March 3rd and 4th when the floors were finally reinstalled and work in the bath resumed (I: 126).

On March 5th, a disagreement about the tiles to be installed on the bathroom floor caused work to stop again, and Pelli sent no workers to the apartment from March 6 through March 23 (III: 706). As a result of the events of March 5th, Pelli filed a motion for an order of contempt against petitioners in the Supreme Court access case, which was assigned by Judge Kapnick to Special Referee Lancelot Hewitt for a hearing. Referee Hewitt issued his findings in a Decision and Order dated December 29, 2003, which concluded that Pelli failed to prove that petitioners knowingly disobeyed the court's order. *See Pelli v. Connors*, Index No. 112367/01 (Sup. Ct. N.Y. Co., Decision & Order of Referee, Dec. 29, 2003) ("Referee's decision"). His findings and conclusions were adopted by the court in *Pelli v. Connors*, Index No. 112367/01 (Sup. Ct. N.Y. Co. Feb. 9, 2004) (Kapnick, J.) and are entitled to preclusive effect here. *See Ryan v. New York Telephone Co.*, 62 N.Y.2d 494, 500-01, 478 N.Y.S.2d 823 (1984); *Buechel v. Bain*, 97 N.Y.2d 295, 303-04, 740 N.Y.S.2d 252, 257 (2001) (collateral estoppel applies where an identified issue now said to be controlling was necessarily decided in a prior action which provided a full and fair opportunity to contest the decision).

The contempt hearing reviewed the work stoppage that ensued when petitioners insisted that Pelli install certain floor tiles that they said he agreed to install in their bath years earlier (*see* Resp. Ex. K). On March 4, Pelli agreed to install the tiles, but on March 5, arrived at the apartment with different tiles (Referee's Decision at 17, ¶ 5).[12] The Referee found Pelli responsible for the work stoppage, stating that:

---

[12]Pelli initially agreed to install tiles that were 4" x 4" in size but later changed the size to 2" x 2" based upon his contractor's recommendation (VI: 144-51). Petitioners initially resisted this change.

> Pelli's failure to comply with the parties' oral agreement, as well as the angry verbal exchange he had with them, contributed significantly to the work stoppage in the apartment on March 5, 2003, inasmuch as he left the apartment before the parties' differences could have been possibly worked out.

(Referee's Decision at 18, ¶ 10). The record did not establish exactly how long the resulting disagreement lasted, but before it was resolved, the tiler went on a scheduled vacation (VI: 149-51). The tile work was to start on March 6 (VI: 145), so March 7 – a Friday – was the last available workday before the tiler's vacation. Sklar's back-up tiler was otherwise engaged at the time. Having caused the work stoppage immediately before the tiler's vacation, Pelli is responsible for the time of the work stoppage through the time that the tiler returned. Apparently, the tiler's vacation ended around March 18. In a note dated March 17, Pelli abruptly cancelled the work scheduled to resume on March 18 complaining that petitioners had purchased the wrong (4" x 4") sized tile (Pet. Ex. 51; Resp. Ex. AA). Pelli had been aware of the tile size that petitioners purchased since March 7, so it is unclear why nothing was done to resolve this issue earlier. I, therefore, did not find petitioners responsible for this delay. In fact, petitioners' counsel wrote Mr. Wisotsky on March 17 asking him to act on Pelli's postponement of the work (Pet. Ex. 51, pp. 3 & 5). It appears that Mr. Wisotsky did not use the intervening time to forge a resolution either.[13] The work eventually resumed on March 24.

I find that Pelli, who was responsible for the work stoppage on March 5, was also chargeable for the intervening period until March 24 when work finally resumed. I further find that, during that

---

[13]Mr. Wisotsky billed no time on this case after March 8, when the work was stopped (Resp. Ex. V). He had no response to petitioner's questions about what he did to get the work restarted, yet his opinion of counsel's May 17 letter was that it was merely to create a "paper trail" (V: 189-93). He claimed that there was nothing he could do to direct Pelli because Pelli "was at the behest of subcontractors and contractors and scheduling," which he failed to explain. During trial, Mr. Pelli argued strenuously that Mr. Wisotsky would verify that he in no way harassed petitioners, and Mr. Wisotsky did in fact render that opinion. Mr. Wisotsky's testimony was not entirely convincing, however, given his failure to recall details about salient events and to demonstrate that he had a grasp of the issues and negotiations involved in getting this work done. He also admitted having no knowledge of the Loft Law. As a consequence, I had no basis upon which to credit his opinion, even if I had thought it appropriate. Mr. Wisotsky's ability to evaluate the situation was also hampered by the fact that he was in the parties' presence only twice, on March 3rd and 4th, when he visited the apartment (V: 181). In all, I found Mr. Wisotsky to be relatively uninterested in the tenants' needs. He indicated that when he received a letter from Connors on March 26 stating that he had no sink and no toilet that "sometimes it was better not to do anything and not to react, because it was hysterics"; he was therefore relieved by receiving a letter from Pelli on March 28 indicating that everything was fine (V: 199-200). When asked whether he was advised that the tenants would be without a toilet, he stated that he "didn't need to know the minutia" (V: 200).

time, petitioners were forced to live in unhabitable conditions where their bathtub was their only source of running water and their loft remained under construction and in a dangerous condition with demolished kitchen floors, and that the willful existence of this condition for the period March 5 through 24, 2003, constituted harassment. Accordingly, paragraph 31 is sustained.

Paragraph 32 alleges that petitioners made numerous requests for the work to be completed and for a work schedule, and when none was sent, offered their own dates for reinstallation of the cast iron sink and the kitchen floor and the provision of their own workers to do the work. The owner threatened legal action if petitioners hired workers.

This allegation fails to refer to specific requests or a particular period of time, and does not indicate how petitioners were harmed by the conduct alleged. I find that it fails to establish a separate basis for harassment and should be dismissed.

Paragraph 33 alleges that, in order to re-cement the bathroom floor, workers removed the toilet and placed it in the bathtub and, instead of replacing it later that day as promised, left it there for two days, from the morning of March 26 through the afternoon of March 28. This created two problems for petitioners during the intervening two days: it left them without a toilet, and it created the unsanitary condition where their toilet was located inside their only water source, the bathtub.

The work in petitioners' loft resumed on March 24 with demolition of the bathroom floor (VI: 151). On March 25, the workers discovered that a mud set was needed on the bathroom floor, which caused a delay. On March 26, the tiler brought workers who leveled the bathroom floor, put down the mud set, and laid the tiles; to do so, they removed the toilet, which they placed inside the bath tub (I: 125, 247-51; III: 620). Byrne was home that day and she ran errands to buy additional tiles when necessary. Byrne said that the tiler told her that the toilet could be reinstalled later that day because the cement was quick drying. The workers walked on the tiles as they worked (III: 622). They finished work around 3:00 or 4:00 p.m., but no plumber came. The workers placed buckets at the door to the bathroom before they left but gave petitioners no instructions.

After waiting for a plumber to show, petitioners wrote Pelli to complain about the toilet (Pet. Ex. 49). Byrne said they had no warning that they would be without a toilet that night, nor had they been given instructions about whether they could enter the bathroom. The next day, Pelli delivered a letter stating that petitioners had been told that they would be without a toilet and could not enter

the bathroom (Pet. Ex. 50).[14] The letter further claims that Pelli had previously given them guest passes to use the facilities at a local gym (Pet. Ex. 49), but those passes, given to them on or about March 3rd, had expired. He brought new ones on March 27 after he delivered the letter. He also offered petitioners use of the restroom in the restaurant downstairs in the building.

On March 28, the plumbers completed the work: they reinstalled the toilet and installed the bathroom and kitchen sinks (I: 123-25). Petitioners said that no work was done on March 27 (IV: 74), but Mr. Sklar said the workers returned to do the grouting on the 27th (VI: 152-53). Sklar said that no one could walk on the tiles for 24 hours after they were laid in the mud set and that the grouting was done after that 24-hour period, but he denied that the grouting required an additional 24 hours to set. His testimony left open the question of why petitioners were without their toilet for the second day.[15]

Despite Pelli's representations, I was utterly unconvinced that he warned petitioners that they would be without a toilet or water source for those two days, as his letter suggests. Petitioners' March 26 letter to Pelli corroborates their contention that they lacked advance knowledge, but even more than that, their lack of knowledge is indicated by the absence of any letter from them to Pelli prior to that date indicating they were told and seeking exacting details about when the tile work would be completed, the toilet reinstalled, and what alternative bathroom arrangements were available – which surely would be expected had Pelli notified them they would be without a toilet for two days.

Again, Pelli is guilty of failing to give petitioners appropriate notice of what would be a significant inconvenience for them, though this time there was no firm legal requirement to do so. Michael Sklar testified that he told Pelli that there would be times when the toilet would not be

---

[14]Pelli's letter states: "You have been instructed that when the tile is placed on the floor, it requires a period to dry. If you walk on the wet cement, you will destroy the work. You know this. You have also been told that you will be without your bathroom from Wednesday night through Friday morning." (Pet. Ex. 50). Petitioners deny being given any advance warning (III: 633). Pelli's letter disingenuously states that "Carl Wisotsky will confirm the above" even though Mr. Wisotsky had not been in the apartment since March 4th and could not have been present for any recent conversations on the matter.

[15]Mr. Wisotsky also recalled that no one could enter the bathroom for 24 hours after the floor was put down (V: 156). He had no specific recall of why the bathroom was unavailable for two full days, though he somehow attributed the blame to petitioners (V: 172-75).

available to the tenants because of the tile work (VI: 112-13). Pelli himself communicated this in his initial access notice in December 2002, but he failed to inform petitioners when the work was imminent. I have no doubt that that failure was intentional.

It was not contested that, from the afternoon of March 26 to the afternoon of March 28, petitioners' only water source, the bathtub, also held their toilet. They had been washing dishes and brushing their teeth in the bathtub since January 30, so for those two days, they did so while the toilet also sat in the tub (I: 251-53). Without question, this situation subjected petitioners to "completely unsanitary conditions." They also said they used a bucket for elimination during the night, which was humiliating and caused Byrne to have back spasms. Byrne contended that the apartment was left in this condition intentionally and in exactly the situation that she had tried to forestall by asking Pelli for details of the scope and schedule of work prior to work beginning (I: 117). She believed that Pelli's intent was to "leave [them] with a destroyed home . . . to make the conditions untenable so that we would want to leave." Byrne said that Pelli "stole four months out of" her life, and that she dreaded coming home during this time (III: 679).

Here, the question is whether Pelli is responsible for this situation where petitioners were left for two days with no toilet and with their bathtub – the only place they could get clean water – being used to store their toilet, and whether such conditions constituted harassment.

It cannot be seriously disputed that Pelli is responsible for this situation inasmuch as his workers left the bathroom in this condition. Moreover, I credited Byrne's testimony that the workers were aware of her concern about being left without bathroom facilities.

Although given ample opportunity during his testimony, Pelli's contractor failed to explain why petitioners were not allowed to enter the bathroom on March 27th (after the initial 24 hours had run) and why the toilet was not reinstalled then. Despite this failure, however, it was petitioners' burden to prove that this occurrence was deliberate and in bad faith, and they failed to do so. *See Kasher v. BLF Realty Holding Corp.,* OATH 262/99, at 68 (harassment was not sustained where owner made good faith efforts to get phone lines repaired that were cut during a construction job, and did so within a day). The extra day could reasonably have been a natural consequence of construction.

On the other hand, Pelli's failure to give any reason for not warning petitioners about when to expect this inconvenience was intentional. Pelli's letter written after the fact to claim that he had given petitioners prior notice was as transparent as it was unworthy of belief, similar to his fake 2-01(g)(2) notice. Moreover, his lack of notice was not unusual as it was in keeping with the parties' continued failure to discuss matters that individuals normally discuss, given as they are to letter-writing and accusations. That something as simple as a warning that "you will be without running water and a toilet for two days" was never given and is the subject of litigation is a tragedy, yet it exemplifies the deep disregard shared by these parties. Though a plumbing job may reasonably result in two days of inconvenience for tenants, the lack of notice was deliberate, avoidable and the product of bad faith. *See Matter of the Application of Alkara*, OATH Index No. 1101/03 (Oct. 6, 2004), *aff'd in part, modified in part*, Loft Bd. Order No. 2920 (Apr. 21, 2005) (owner engaged in intentional and deliberate acts of harassment by accessing tenant's apartment and removing his bathroom fixtures without his knowledge and permission while he was out of town, and in deliberate defiance of his written instructions that his subtenant was not authorized to provide access). It was also consistent with Pelli's repeated refusals to provide appropriate access notices.

Accordingly, I find that paragraph 33 is sustained by Pelli's intentional, bad faith failure to provide petitioners with prior notice that they would be without running water and a toilet for two days, which resulted in substantial inconvenience for petitioners which Pelli knew would occur. I find that this conduct was calculated to disturb "the comfort, repose, peace [and] quiet" of petitioners' occupancy of their unit and to cause them to vacate the unit.

Respondent's Positive Act Defense

As a defense to this application, Pelli seeks to apply the holding in *Matter of Latin,* OATH Index No. 1110/00 (June 19, 2000), *adopted*, Loft Bd. Order No. 2555 (July 20, 2000), *applic. for reconsid. denied*, Loft Bd. Order No. 2747 (July 30, 2002), to rebut petitioners' claims of harassment with evidence of his own positive acts. He cites as positive acts the work that he has completed in the building and in petitioners' unit (III: 639-54). In the building, Pelli completed facade work, painted the hallways, and put marble in the lobby. In petitioners' unit, Pelli repaired their radiator, installed their smoke detector, and exterminated. He also completed the work that forms the basis

of this harassment claim, doing electrical rewiring, installing waste pipes and venting, replacing bathroom walls, laying tile, and, finally, installing a kitchen sink (which had never been installed before). It bears noting that much of this work was required under the terms of the narrative statement, by court order, and/or to cure violations issued by the Department of Buildings. Nevertheless, Pelli insists that such compliance should be seen as positive acts that rebut a finding of harassment. I disagree.

Pelli misreads the holding in *Matter of Latin.* In *Matter of Latin*, the tenants asserted a claim of harassment on the basis of a noise condition created by a commercial tenant that occupied the floor below them. ALJ McFaul held, and the Loft Board agreed, that petitioners failed to make a *prima facie* case that the owner possessed the intent to deprive them of their protected occupancy rights, an essential element of harassment. Although the Loft Board adopted ALJ McFaul's recommendation and dismissed the harassment claim, it also struck all evidence submitted by the owner because he defaulted in answering the petition.

In his recommendation, ALJ McFaul commented upon the owner's testimony about improved services in the building, stating:

> There is no evidence that the landlord diminished essential services to any other tenants or engaged in a course of conduct intended to coerce them into leaving the building. On the contrary, the record supports a finding that Mr. Nassi improved services in the building by keeping it cleaner, providing regular exterminating services, installing a new roof and upgrading the commercial tenancies. These acts are contrary to a finding that the owner was using illicit means to harass residential tenants.

Latin, OATH 1110/00, at 16.

Pelli's argument suggests that any positive acts by the owner may nullify otherwise harassing conduct, thus establishing the precedent that harassment may be tolerated so long as the work eventually gets done. This could not possibly have been the intent of the Loft Law and was not the holding of *Latin*, which did not establish a "defense" to the claim of harassment that is not otherwise provided in the Loft Law. Rather, *Latin* found primarily that the tenants failed to establish their *prima facie* case by failing to submit sufficient proof that the owner intended to deprive them of rights, and secondarily that the additional upgrades made to the building by the owner (not basic

legalization) were contrary to an inference that he had the intent to harass. By contrast, here, the tenants established their *prima facie* case on a number of their harassment claims by providing convincing evidence that Pelli had the requisite ill intent based upon his knowing disregard of the applicable legal requirements, the willfulness and repetitive nature of his conduct, and his lack of candor at trial. It is also worth noting that petitioners are the last IMD tenants left in the building. Moreover, the work that was done did not create a positive inference about Pelli's intent since the work was required either by order of a court or other authority or was necessary to achieve legalization, and therefore inured to his benefit at least as much as to petitioners'.

Respondent's Claim that Filing is Frivolous under Section 2-02(c)(2)(iii)

Pelli asserts that petitioners' claims are frivolous and, for that, he seeks a civil penalty of $1,000. Loft Board rules provide that "a complainant found by the Loft Board to have filed [a harassment] complaint in bad faith or in wanton disregard of the truth may be subject to a civil penalty not to exceed $1,000 for each such violation." 29 RCNY § 2-02 (c)(2)(iii). The standard for issuing sanctions under this rule supports such action in only the most egregious circumstances. For example, in *Matter of Wilson*, the tribunal dismissed six separate claims of harassment where the sole evidence consisted of the tenant's uncorroborated statements, most of which the ALJ found were incredible and imposed a $1,000 fine on the tenants. *See Matter of Wilson*, OATH Index No. 1573/97 (Mar. 20, 1998), *adopted*, Loft Bd. Order No. 2280 (Sept. 24, 1998). The ALJ also found that the tenant's complaints were "baseless" and filed in "bad faith," and that the tenant made false representations in order to delay the adjudicative process and to avoid providing evidence in support of the charges.

I did not find that petitioners' claims were made in bad faith or in wanton disregard of the truth. Petitioners provided extensive evidence of their claims, demonstrated by the more than 70 exhibits entered in evidence and extensive detailed testimony of the events at issue. And, ultimately, many of their claims were sustained. Though petitioners, *pro se* litigants with no legal training, overestimated the strength of some of their claims, I found none of them to be asserted in bad faith.

Pelli would disagree. For example, respondent claims that petitioners' allegation that he did not have required permits to do the work was asserted in wanton disregard of the truth because DOB

records demonstrated that he had the appropriate permits, which his evidence confirmed (Resp. Ex. T). Petitioners based their position on their own research of DOB records as well as a stop work order issued by a DOB inspector during the course of the renovation, which found that applicable permits were not issued. Although the stop work order was later dismissed at a hearing, it was not petitioners' fault that they received faulty information from the DOB. Their decision to press their claims here, even after dismissal of the stop work, is not frivolous given the conflicting information in DOB's records.

Pelli also cites paragraph 13 of petitioners' application in which they allege that he was told on January 9 that he could enter their apartment if he turned off his video camera, which he asserts is untrue. In their testimony, petitioners reversed their positions admitting that the video did not show an explicit request that Pelli turn off his camera (IV: 141-42). Though the allegation proved to be false, I did not find that it was made in bad faith. Also, though I found petitioners' claims of threats and intimidation to be exaggerated, I did not believe that these were not their subjective beliefs or were the product of bad faith; rather, I concluded that the claims were unreasonable in context.

Thus, I find no basis to respondent's contention that petitioners asserted frivolous claims, or claims in bad faith and in wanton disregard of the truth.

Nevertheless, petitioners are admonished to take heed that the tribunal's patience with the shrillness of their claims is wearing thin. Though they are lay litigants, they are experienced litigants having appeared *pro se* in numerous proceedings in this forum. Given the fact that few matters remain to be done – namely the installation of their windows – they should recognize that the battle is ended and embrace the near completion of their journey toward legalization.

Penalty

Loft Board regulations authorize imposition of civil penalties up to $1,000 "for each occurrence that is found to constitute harassment." 29 RCNY § 2-02(d)(1)(ii). In previous cases where findings of harassment have been made, the Board has generally imposed a separate fine for each finding. *See Matter of Kalmanowicz*, OATH Index No. 1333/97 (Aug. 25, 1997), *aff'd*, Loft Bd. Order No. 2162 (Oct. 10, 1997); *Matter of Jones,* Loft Bd. Order No. 1822, 16 Loft Bd. Rptr. 4, 13-

14 (July 27, 1995); *Matter of Abbott,* Loft Bd. Order No. 914, 9 Loft Bd. Rptr. 84, 87 (June 29, 1989).

In the instant case, seven of petitioners' claims of harassment and a subset of two additional claims of harassment are sustained. Four of these claims, in paragraphs 2, 4, 5 and 7, constitute a single act of harassment, as my finding of harassment is based on an analysis of the sum of the allegations in these claims and not upon the individual circumstances of each claim, and, while each claim in isolation may not constitute harassing conduct, the sum of the claims evince harassing conduct. Paragraphs 11 and 12 alleged two kinds of conduct – Pelli's failure to provide a scope of work and his failure to provide a schedule of work – the latter of which was sustained as an act of harassment. Therefore, I have found that the harassing conduct contained in those two claims constitute a single act of harassment. Accordingly, I recommend that respondent be fined $5,000: $1,000 for the allegations in paragraphs 2, 4, 5 and 7, $1,000 for the allegations in paragraphs 11 and 12, $1,000 for the allegations in paragraph 13, $1,000 for the allegations in paragraph 31, and $1,000 for the allegations in paragraph 33.

Pursuant to section 2-02(d)(2)(i) of the Loft Board Rules, an order containing a finding of harassment "shall specify the period of time, within a range of one to three years from the date of the order of harassment, during which the landlord shall be barred from applying for an order of termination." I recommend that Respondent be barred for two years from the date of the Loft Board Order affirming this recommendation from filing an application seeking a termination of these findings of harassment. Pursuant to section 2-02(d)(2)(ii), an owner found guilty of harassment shall be barred from decontrolling an interim multiple dwelling unit based upon a sale of improvements until the finding of harassment has been terminated.

FINDINGS AND CONCLUSIONS

1. Respondent owner's deliberate and repeated failure to serve tenants with proper access notices according to Loft Board rule 2-01(g) and simultaneous demand for access while threatening legal action if they did not provide it, as alleged in paragraphs 2, 4, 5, and 7 of the complaint, constituted harassment of the tenants. I recommend, therefore, that the Loft Board impose a fine of $1,000 upon respondent owner for these charges, collectively, as a single act of harassment.

2. Respondent owner's repeated failure to provide tenants with a schedule of the work to be done in their unit to notify them when demolition would occur and when essential services, such as running water and toilet, would be unavailable, despite their many requests, as alleged in paragraphs 11 and 12 of the complaint, constituted harassment of the tenants. I therefore recommend that the Loft Board impose a fine of $1,000 upon respondent owner for this act of harassment.

3. Respondent owner's bad faith conduct when he failed to confirm January 9th as the start date for the work, then cancelled the work, then insisted upon gaining immediate access while videotaping petitioners and stating on the tape that he had not cancelled the work, as alleged in paragraph 13, constituted harassment of the tenants. I therefore recommend that the Loft Board impose a fine of $1,000 upon respondent owner for this act of harassment.

4. Respondent owner's failure to complete the construction of tenant's unit, forcing them to live in unhabitable conditions where their bathtub was their only source of running water and their loft remained under construction and in a dangerous condition with demolished kitchen floors for the period March 5 through 24, 2003, as alleged in paragraph 31 of the complaint, constituted harassment of the tenants. I therefore recommend that the Loft Board impose a fine of $1,000 upon respondent owner for this act of harassment.

5. Respondent owner's failure to give petitioners advance notice that their bathroom would be unavailable to them for two days, and leaving them for that period with their toilet sitting in their bathtub – the only place they could get running water – constituted harassment of the tenants, as alleged in paragraph 33 of the complaint. I therefore recommend that the Loft Board impose a fine of $1,000 upon respondent owner for this act of harassment.

6. I further recommend that respondent owner be barred for two years from the date of the Loft Board Order adopting this recommendation from filing an application seeking a termination of these findings of harassment.

7. Petitioners' remaining allegations of harassment, as alleged in paragraphs 1, 3, 6, 8, 9, 10, parts of 11 and 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, and 32, were not supported by the evidence and should be dismissed.

8. Owner did not establish a defense to harassment allegations by putting forth evidence of completed work in the building and in petitioners' unit, most of which consisted of work required under the narrative statement, pursuant to court order, and to satisfy violations issued by the Department of Buildings.

9. Petitioners' unsustained allegations of harassment were not frivolous, or made in bad faith or in wanton disregard of the truth, therefore I recommend that the Loft Board dismiss respondent's counterclaim.

Tynia D. Richard
Administrative Law Judge

June 20, 2005

SUBMITTED TO:

MARC RAUCH
Chairperson

APPEARANCES:

WILLIAM CONNORS, SUSAN BYRNE
Petitioners, pro se

DANIEL PELLI, ESQ.
Respondent, pro se