CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART R

HARVEY FISHBEIN, AS RECEIVER

Petitioner

-against-

KENNETH MACKAY A/K/A
KENNETH I. MACKAY
319 EAST 115TH STREET, APT 1A
New York, New York 10029

Respondent-Tenant

HON. SABRINA B. KRAUS

DECISION & ORDER
Index No.: L&T 95075/2011

BACKGROUND

This summary nonpayment proceeding was commenced by Harvey Fishbein, as receiver (**Petitioner**) against Kenneth Mackay (**Respondent**), the rent-stabilized tenant of record, of apartment 1A at 319 East 115th Street, New York, New York, 10029 (**Subject Premises**) based on the allegation that Respondent had failed to pay rent which was past due.

PROCEDURAL HISTORY

Petitioner issued a three day demand on December 7, 2011 seeking $24,807.84 in rent arrears, for a period covering October 2010 through December 2011, at a monthly rent of $1668.46. The petition issued on December 23, 2011. Respondent filed an answer on January 10, 2012, asserting a general denial, rent overcharge and a violation of the warranty of habitability. The proceeding was originally returnable on January 19, 2012.

On March 9, 2012, Petitioner moved for an order dismissing Respondent's claims of rent overcharge and warranty of habitability, to the extent they were asserted as counterclaims in this

proceeding. The motion was resolved pursuant to a stipulation dated March 9, 2012, which provided that Respondent's overcharge claims were withdrawn, without prejudice to his right to pursue administrative remedies concerning a previous denial of said claim, and Petitioner's motion was withdrawn without prejudice. The proceeding was adjourned to April 26, 2012 for trial.

On April 26, 2012, Respondent moved for an order permitting discovery and Petitioner cross-moved for sanctions. The motion for discovery was granted in part, and the motion for sanctions was denied. The trial was rescheduled for May 25, 2012. On May 25, 2012 the proceeding was assigned to Part R for trial, and the trial commenced. The trial continued on June 12, and concluded on June 25, 2012. The parties submitted post trial memoranda on July 23, 2012 and the Court reserved decision.

PRIOR LITIGATION

There was a prior non-payment proceeding between the parties under Index Number 92984/2010. That proceeding was commenced in December 2010. Respondent asserted an answer in that proceeding that included defenses regarding repairs, and rent overcharge. Although Respondent's answer raised no issue regarding the adequacy of the rent demand, the file was marked dismissed on October 31, 2011, based on a defective rent demand. The court takes judicial notice of said proceeding and the entire contents of the file in said proceeding. The file contains an inspection report from a January 4, 2011 inspection. That report establishes conditions existed in the Subject Premises as of said date which served as the basis for the imposition of seven Class B Violations and one Class C violation. The violations were for

conditions which included painting and plastering in the Kitchen, Broken sink counter top in the Kitchen, loose faucets in the kitchen and rat infestation.

TRIAL

Petitioner is the Receiver of the building in which the Subject Premises are located, and is authorized to maintain this proceeding. Petitioner was appointed Receiver pursuant to an order issued by the Supreme Court in *The Bank of New York Mellon trust Co et al v DDEH 291 Pleasant LLC* index No 602806/09 (Ex 1). The subject building is registered with HPD (Ex 2). The legal registered rent for the Subject Premises as of April 2012 is $1668.46 per month (Ex 3). Respondent entered possession of the Subject Premises pursuant to a lease agreement dated March 18, 2004, for a one year period ending April 30, 2005, which provided the legal regulated rent was $1317 per month (Ex. 6). The Lease contains a preferential rent rider asserting that Respondent's rent would be $1100.00 per month, and that the preferential rent would be used to calculate any increases if the lease were renewed, and applicable for the duration of Respondent's tenancy.

Respondent never signed another lease agreement. Petitioner tendered two renewals to Respondent, one on January 1, 2012, for a period covering May 2012 forward (Ex. 8), and a prior renewal on January 24, 2011 covering a period from May 1, 2011 forward (Ex.7). Neither renewal was executed by anyone. There is no lease agreement in evidence supporting a rent of $1631.75 sought by Petitioner for the period through April 2011. The renewals in evidence were "deemed" renewed by Petitioner for a one year period.

Eric David (David), a managing agent for Petitioner, testified that there was $29,488.36 due in arrears through May 2012. Petitioner's rent ledger (Ex 9) starts with an opening balance

in April 2010, which figure was provided to David by the prior managing agent. The amount of the opening balance was $1762.45. This sum of $1762.45 was withdrawn by counsel for Petitioner on the record.

Respondent testified on his own behalf. Respondent testified that he took it upon himself to do his own repairs in the Subject Premises, when possible. Respondent took the floors in the Subject Premises apart and put them back together again. Respondent did not put Petitioner on notice of the condition of the floors prior to deciding to repair the condition himself. To the extent Respondent vaguely testified to having put the Super on notice at some unspecified date, the Court does not credit Respondent's testimony.

Respondent testified that there has been an ongoing problem in the Subject Premises with mice and rats, but that the problem improved when Respondent got a cat. Respondent acknowledged he never put Petitioner on notice of any issue with infestation prior to Petitioner's commencement of this proceeding. Respondent testified about other issues in the bathroom, going back to 2008 and 2009. Respondent testified credibly that there were sporadic gaps in the provision of heat and hot water, during the winter months of 2011 and continuing in the early part of 2012. Petitioner was on notice of these instances. Respondent acknowledged that when he emailed David about a lack of heat or hot water, David typically responded promptly. Respondent acknowledged that there is a monthly extermination service provided by Petitioner, which Respondent has never elected to sign up for.

On rebuttal, Petitioner documented several unsuccessful attempts to gain access to the Subject Premises to effectuate repairs. The Court finds that Respondent impeded access from December 2011 forward, on more then one occasion. The Court finds that once Petitioner was

on notice of the conditions, Petitioner acted reasonably and promptly to address the conditions when Respondent did provide access.

DISCUSSION

In order to maintain a summary nonpayment proceeding, Petitioner must establish an agreement to pay rent, and has the burden of proving the existence of an agreement to pay the rent demanded (RPAPL §711(2); *402 Nostrand Ave Corp v Smith* 19 Misc.3d 44). In this case, the evidence in the record makes it very difficult to tell what if any agreement there was between the parties to pay rent. It is undisputed that Respondent signed only one lease since moving into the Subject Premises (Ex. 6). That lease provided for a monthly rent of $1317.00 per month on the first page. However, the lease also had a preferential rent rider providing for a preferential rent of $1100.00 per month. The rider provides:

> The monthly legal regulated rent for the apartment is $1317. Renter acknowledges that this agreement shall in no way affect the monthly legal rent for the subject apartment. Owner reserves the right to calculate the rental amount for future **vacancy** leases for this apartment based upon this monthly legal regulated rent.
>
> Instead of the legal regulated rent set forth above, Owner agrees to charge and Renter agrees to pay a monthly preferential rent of $1100.00, and shall pay this same amount as a security deposit. If renter chooses to renew the terms of this lease, **this preferential rent** amount, plus all other lawful increases, **shall be used to calculate all applicable increases to establish the renewal rent**. Thereafter, each successive renewal rent shall be calculated based upon increase to the most recently established renewal rent for as long as the Renter remains in occupancy (Ex. 6 *emphasis added*).

The Court finds that this provision of the lease between the parties was a binding contractual agreement, that the preferential rent would remain in place throughout the tenancy, and that any increases would be based on the preferential rent, rather then the legal rent (*Aijaz v Hillside Place LLC* 8 Misc3d 73; *Rosenshein v Heyman* 18 Misc3d 109; *Colonnade Management*

LLC v Warner 11 Misc3d 52). Petitioner offered no evidence of any lease renewals that were executed between the parties after the initial lease, and the Court finds that no renewals were executed. The initial lease ran for a term through April 30, 2005.

Petitioner offered no evidence that any renewals were offered to Respondent prior to January 24, 2011. Petitioner offered evidence that two lease renewals were offered to Respondent one in January 2011 (Ex. 7) and another in January 2012 (Ex 8). Petitioner takes the position that both lease renewals were deemed renewed. There is no evidence to support that position in this record.

§ 2523.5 (c)(2) of the Rent Stabilization Code provides:

> Where the tenant fails to timely renew an expiring lease or rental agreement **offered pursuant to this section**, and remains in occupancy after the expiration of the lease, such lease or rental agreement **may** be deemed to have been renewed upon the same terms and conditions, at the legal regulated rent, together with any guidelines adjustments that would have been applicable has the offer of a renewal been timely accepted.

(*Emphasis added*).

Although in the context of Rent Overcharge complaints examination of a rent history is limited to four years, the Court may look beyond the four years in proceedings involving the original terms and conditions of a preferential rent offer (DHCR Fact Sheet #40).

Pursuant to RSC § 2523.5(a) in order to be a valid renewal offer the offer must be on the same terms and conditions as the expiring lease. Thus in order to be able to deem any lease renewed after the expiration of the original lease on April 30, 2005, Petitioner must show a valid offer was made. Petitioner has failed to establish this. The only two offers Petitioner submitted evidence of were not based on a continued preferential rent, but were based on the legal regulated rent.

While the claim of Rent Overcharge originally asserted in Respondent's answer has been withdrawn pursuant to the parties' March 9, 2012 stipulation, the Court considers these issues in determining what the agreed rent was between the parties, in the absence of an executed agreement after the expiration of the initial lease term.[1]

DHCR rent registration records reflect that on July 20, 2006, the landlord registered the Respondent paid a preferential rent of $1175. If there had been deemed renewals for every year since the expiration of the initial lease for a one year period based on the preferential rent the increases should have been calculated as follows:

Renewal Period	Percentage Increase[2]	Rent
5/1/05 - 4/30/06	3.5%	$1100 + $ 38.00 = $1138
5/1/06 - 4/30/07	2.5%	$1138 + $31.31= $1169.81
5/1/07 - 4/30/08	4.25%	$1169.81 + $ 49.72= $1219.53
5/1/08 - 4/30/09	3 %	$1219.53 + $36.59 = $1256.12
5/1/09- 4/30/10	4.5%	$1256.12 + $56.53 = $1312.65
5/1/10 - 4/30/11	3%	$1312.65 + $39.38 = $1352.03
5/1/11 - 4/30/12	2.25%	$1352.03 + $30.42= $ 1382.45
5/1/12 0 4/30/13	3.75%	$1382.45 + $51.84 = $1434.29

[1] The record indicates that DHCR denied Respondent's overcharge claim, but it is not clear whether the claim filed by respondent at DHCR was predicated on the preferential rent issue.

[2] Percentages taken from Rent Guidelines Board Apartment Orders #1 through #44 as published on the website at nycrgb.org.

Thus, whether or not there were intervening renewals between the original lease and the two renewal offers put into evidence, its is clear that the last two renewal offers can not be deemed renewals, because they were not proper offers in that they were based on the legal rent rather then the preferential rent. A tenant's election not to sign a lease renewal which is not offered on the same terms and conditions as the expiring lease is justified (*East Side Managers Associates, Inc. v Goodwin* 2010 NY Slip Op 50365[U]).

RSC §2523.5 (d) provides that "... the failure to offer a renewal lease pursuant to this section shall not deprive the tenant of any protections or rights provided by the RSL and this Code and the tenant shall continue to have the same rights as if the expiring lease were still in effect."

Additionally, the Court notes that recent case law suggests that a deemed renewal would require some evidence of an implied agreement beyond just the fact that a proper renewal was offered (*see eg Samson Mgt LLC v Hubert* 92 AD3d 932 which affirmed the Appellate Term decision at 28 Misc3d 29 *holding the issue of whether an implied agreement for a new lease can be found to exist when a rent stabilized tenant fails to sign a renewal lease but stays and pays the higher amount without any other communication between the parties not yet determined*).

"The holding in *Samson Management LLC v Hubert* ... will require parties to litigate the issue of whether an implied or express lease agreement has been entered into by a rent stabilized tenant who holds over and has not signed a renewal lease. Attorneys for both parties will have to explore carefully their clients' actions that may have created an express or implied lease (Scherer *Residential Landlord-Tenant Law in New York* §4:183)."

Given that there was no deemed renewals, the court must look to whether there was another implied agreement between the parties. Neither party offered evidence in this regard. A review of the rent history shows that Respondent's payments have been sporadic and in varying amounts. No agreement to pay a higher rent thus can be inferred from the payments alone. For example, in April 2010, Respondent paid $600 on April 15, $600 on April 22, and $480 on April 29th. Payments through December 2010 remain equally sporadic. After January 2011, no payments were made other than in relations to pending litigation and without prejudice to the claims of either party.

"In the absence of proof of an agreement, deemed or actual, by tenants to pay a higher rent, it must be held that the landlord's continued acceptance of tenants' rent payments after the ... expiration of the lease, continued the tenancy at the rental set forth in the expired lease (*402 Nostrand Ave Corp v Smith* 19 Misc3d 44, 46 *citing* Real Property Law §232-c; *City of New York v Pennyslyvania RR Co* 37 NY2d 298; *Farrell Lines Inc v City of New York* 63 Misc2d 542 *affd* 35 AD2d 788 *affd* 30 NY2d 76).

Based on the foregoing, the Court finds that the rent for Respondent remains at $1100.00 per month from the time his initial expired through the date of the trial. At that rate, there was a total of $23,100.00 due for the period of October 2010 through June 2012. Petitioner has withdrawn its claim for $1762.45 of said sum, which reduces the arrears to $21,337.55. Respondent made payments of $6616.92, during this period, which further reduces the arrears to $14,720.63 through June 2012.

The Court finds that rent impairing conditions existed in the Subject Premises and that Petitioner was on notice of these conditions from at least January 2011 when an HPD inspection

resulted in reported violations being placed on the Subject Premises. However, the Court also finds that Respondent made access difficult sometimes denying access altogether for repairs. The Court finds that petitioner acted reasonably and promptly when notified of conditions requiring repair, when respondent provided access. Moreover, Respondent only raised the issues regarding repairs when the landlord sued him for nonpayment of rent, and Respondent acknowledged at trial that he failed to pay rent arrears he could not afford to make the payments due. As of the time of the trial, all necessary repairs had been substantially completed. Based on the forgoing, the Court finds that Respondent is not entitled to any rent abatement in this proceeding.

CONCLUSION

In conclusion, the Court awards Petitioner a final judgment in the amount of $14,720.63 for all rent due through June 2012. Issuance of the warrant is stayed five days for payment. This constitutes the decision and order of this court.

`Dated: New York, New York
August 13, 2012

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