CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: HOUSING PART T
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M. RUBIN & CO. LLC, Index No. 18625/12

Petitioner,

-against- **DECISION/ORDER**

MARTHA M. ORTIZ,

Respondent.

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Background

Petitioner M. Rubin & Co. LLC commenced this nonpayment proceeding against respondent Martha M. Ortiz in March 2012. The petition alleges, among other things, that respondent's apartment is Rent Stabilized; that she is in possession of that apartment pursuant to a written rental agreement in which she promised to pay petitioner or its predecessor rent of $1,248.11 per month; that the rent demanded does not exceed the lawful Rent Stabilized rent; and that as of March 20, 2012, the date of the petition, respondent owed petitioner $3,790.55 in rent and an additional $50.00 in late charges.

In her *pro se* answer dated April 11, 2012, respondent asserted a general denial and also alleged that the rent, or a portion of the rent, has already been paid and that her rent was increased without a lease for over five years.

In a decision and order dated June 12, 2012, the Court granted respondent's motion for leave to amend her answer to include a defense that petitioner has failed to make repairs.

By notice of cross-motion dated June 7, 2012 and returnable June 12, 2012, petitioner

moved for an order "striking Respondent's defense/claim of rent overcharge" pursuant to Section 3211(b) of the CPLR, alleging, among other things, that it had timely and properly served respondent with renewal leases; that respondent had always paid the higher rents charged to her; and that those payments represent an implied agreement for it to charge her those rents. In a decision and order dated June 13, 2012, the Court denied petitioner's cross-motion, holding that respondent had raised a triable issue of fact with respect to whether petitioner had properly offered her renewal leases.

The Trial

The trial of this case took place on June 25, July 9, July 30, and October 5, 2012.

Petitioner's Evidence

Morris Rubin, who identified himself as a "partner" in petitioner, a limited liability company, testified that respondent's rent was $1,248.11 per month; that as of March 2012, she owed rent from January through March; that on March 15, 2012, he called respondent and made an oral demand for three months' rent; and that as of June 25, 2012, the date of his testimony, she owed six months' rent, totaling $7,488.66. He supported his testimony with a "2011 Registration Rent Roll Report," filed with the New York State Division of Housing and Community Renewal ("DHCR"), which indicated that respondent's legal regulated rent as of April 1, 2011, as registered by petitioner, was $1,248.11 per month. The columns entitled "Lease Began" and "Lease Ends" were blank.

Although Mr. Rubin also submitted in evidence respondent's initial lease from 1994, which called for a rent of $735.00 per month, he did not submit any renewal leases, nor did he submit rent records showing the rent billed to and paid by respondent.

Respondent's Evidence

Martha Ortiz testified that after signing a lease renewal in 2008, she neither received nor signed any renewal leases thereafter, and that despite not receiving renewal leases she continued to pay the rent increases that petitioner billed her until she found out about the "Samson" case[1] when she came to court in April 2012. She also testified about a number of conditions in her apartment (including, but not limited to, what she described as a severe case of mold and peeling and chipping paint in the bathroom) and in the public areas of the subject building (including, but not limited to, a gaping hole in the lobby). According to respondent, because of the conditions in her bedroom, she was unable to sleep there and, instead, slept in the living room. She also said that because of the conditions in her apartment, she became depressed and developed a lung condition; that she wants to move; that she occasionally stays with her mother; and that "at this point" she does not care about repairs.

Although respondent stated that some of the conditions in her apartment had existed for years, she was unable to recall with any specificity when she notified petitioner about them, other than saying that the former superintendent had seen them in 2011 when he came to repair the leak in her bathtub. While she testified that she "probably" wrote to petitioner about repairs at some point in the 18 years she had lived in her apartment, she could not remember when she did so and did not submit copies of any such letters.

Respondent supported her testimony with bank statements, which included copies of checks paid to petitioner from December 2006 through November 2011; DHCR's rent

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[1] Respondent was referring to the Second Department's decision in *Samson Mgt., LLC v. Hubert*, 92 AD3d 932 (2d Dept 2012), in which the court held that an owner of a Rent Stabilized apartment may not deem a tenant's lease renewed pursuant to Section 2523.5(c)(2) of the Rent Stabilization Code (9 NYCRR) "solely by virtue of the fact that the [tenant] remained in [his] apartment after the expiration of the lease . . ." 92 AD3d at 934.

registration records for her apartment, showing the registered rents from 1994 through 2011; a number of photographs of the conditions in her apartment and in the public areas of the building; and a list of current violations of record printed out from the website of the City's Department of Housing Preservation and Development. While the list included a number of violations for the public areas of the building, there were none for respondent's apartment.

Respondent's sister, Myrna Peguero, testified about how the conditions in respondent's apartment have deteriorated over time; described in particular the condition of the ceilings in the bathroom, living room, entrance hall, and kitchen; and said that when she was last in the apartment at the end of September 2012, she could "smell the humidity." She also testified that the conditions in the apartment have made respondent depressed and ill, and that she and other members of the family are trying to help her move.

Petitioner's Rebuttal Evidence

After respondent rested, petitioner called two rebuttal witnesses.

Naomi Rubin, petitioner's in-house counsel, testified that on or about May 30, 2012, she sent respondent letters by both regular and certified mail asking her to provide access to her apartment for repairs to be made; that both letters were returned to petitioner by the US Postal Service; that she sent respondent letters by both regular and certified mail on or about June 14, 2012 again requesting access; that those letters were not returned to petitioner; and that respondent failed to respond to the June letters.

Ms. Rubin supported her testimony with copies of the May 30th and June 14th letters, as well as the envelopes that were returned by the US Postal Service. In the May 30th letter, she asked respondent to provide access on June 13th and to let her know if that date was acceptable. Both of the envelopes that were submitted in evidence were postmarked May 30, 2012 and each

bore a yellow label reading " Return to Sender Not Deliverable as Addressed Unable to Forward." Both envelopes also were stamped "Not Deliverable As Addressed Unable to Forward" and "Forwarding Order Expired."

In Ms. Rubin's June 14th letter, she noted that she had not received a response to her May 30th letter; that she had an on-site manager and superintendent check her apartment "on a daily basis" to gain access; and that she had the superintendent check her apartment "after hours and on weekends to determine if [she was] available . . ."

Emiliano Santana, petitioner's current superintendent, testified that he became the superintendent for the subject building in January 2012; that he has never seen respondent; and that since February 2012, he has gone to respondent's apartment two or three times a week to try to get access. After stating on cross-examination that he also sends "one of the guys" to the apartment, he clarified that he had gone to the apartment himself only seven or eight times since February. He also testified on cross-examination that he only went to the apartment on week days; did not go there on weekends or after 5:30 p.m.; and that no one from petitioner's office asked him to go there after 5:30 p.m.

Neither of petitioner's rebuttal witnesses contested respondent's testimony that she failed to receive or sign any renewal leases after 2008; that a number of unsafe and unhealthy conditions existed in her apartment; and that petitioner, through its former superintendent, had notice of those conditions since at least 2011.

Discussion

Respondent's Monthly Rent

For petitioner to prevail in this proceeding, it must prove, among other things, that the monthly rent it charged respondent does not exceed the maximum rent allowed by the Rent

Stabilization Law ("RSL") (Administrative Code of City of NY § 26-501 *et seq*.) and that respondent either agreed to pay the monthly rent that petitioner claims is due or the law permits petitioner to charge that amount without her agreement. Petitioner failed to do either.

As noted above, petitioner failed to contest respondent's claim that she last signed a renewal lease in 2008 and that she neither signed nor received one after that. According to the DHCR rent registration records for her apartment, after her lease expired on March 31, 2008, her rent commencing April 1st of that year increased to $1,131.29 per month.

It appears from DHCR's rent registration records that, with one minor exception, from 2009 through 2011 petitioner charged respondent Rent Guidelines rent increases for one-year lease renewals.[2] While an owner may charge a Rent Guidelines increase "on the effective date of a lease or other rental agreement" (Rent Stabilization Code ["RSC"] § 2522.2), where he fails to serve a tenant with a proper lease renewal offer, he may not charge that rent increase, and payment of the increase by the tenant constitutes an overcharge.[3] (*See Matter of Johnson*, DHCR Admin. Review Docket No. TF210062RO [Sept. 27, 2005]; *Matter of Dorsey*, DHCR Admin. Review Docket No. RD610072RT [Sept. 20, 2004]; *Matter of Marshen*, DHCR Admin.

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[2] According to DHCR's records, as of April 1, 2009, petitioner charged respondent $1,182.20 per month, a 4.5% increase over her previous rent of $1,131.29 per month; as of April 1, 2010, petitioner charged $1217.67 per month, a 3% increase; and as of April 1, 2011, petitioner charged $1,248.11 per month, a 2.5% increase. The increases for 2009 and 2010 reflected the percentage increases for one-year lease renewals authorized by the Rent Guidelines Board. The 2011 increase, however, should have been 2.25%, not 2.5%. (*See* Rent Guidelines Board Order # 42). Thus, if petitioner had offered, and respondent had accepted, lease renewals for one-year terms commencing April 2009, April 2010, and April 2011, her rent as of April 2011 would have been $1,245.07 per month, not $1,248.11 per month.

[3] Allowing an owner to collect a Guidelines increase without having offered the tenant a renewal lease would deprive the tenant of a number of benefits provided by the RSC, such as the right to choose a one-year or two-year renewal term (*see* RSC § 2522.5[b][1]); the right to have the Guidelines increase commence on the effective date of a lease or other rental agreement (*see id.* § 2522.2); and the right to have a late-offered lease renewal commence on the first rent payment date occurring no less than 90 days after the offer is made (*id.* § 2523.5[c][1]). Even if payment of the rent increase by the tenant could arguably constitute a waiver of such benefits if knowingly and voluntarily made, such waiver by an unrepresented tenant without approval by DHCR or a court of competent jurisdiction would be void. (*See RSC* § 2520.13).

Review Docket No. OG210088RT [Jan. 4, 2002]; *Matter of Driscoll*, DHCR Admin. Review Docket No. OH210056RO [Jan. 4, 2002]; *Matter of Sevag*, DHCR Admin. Review Docket No. NB110046RO [May 29, 2001]). Moreover, unless the owner establishes by a preponderance of the evidence that the overcharge was not willful, the tenant is entitled to treble damages (*see* RSL 26-516[a]; RSC § 2526.1[a][1]; *Matter of Johnson*, *supra*, DHCR Admin. Review Docket No. TF210062RO; *Matter of Sevag*, *supra*, DHCR Admin. Review Docket No. NB110046RO) for overcharges paid within two years prior to interposing her overcharge claim and thereafter. (*See* RSL § 26-516[a][2][I]; RSC § 2526.1[a][2][I]). Where there is an overcharge for which treble damages are not awarded, the tenant is entitled to interest from the date of the overcharge at the rate payable for judgments pursuant to Section 5004 of the CPLR. (*See* RSL § 26-516[a]; RSC § 2526.1[a][1]).

Given petitioner's failure to contest respondent's claim that she did not receive any lease renewal offers after 2008, the Court finds that it may not charge her more than $1,131.29 per month. It also finds that petitioner first charged respondent more than that amount, $1,182.20 per month, on April 1, 2009 and that respondent first paid the increased amount in June 2009, at which time she paid $2,369.11, which covered the increased rent for May and June (plus an additional $4.71).

Rent Overcharge Calculation

Based on the Court's review of the copies of checks submitted in evidence by respondent, from May 2009 through December 2011 she paid petitioner rent totaling $37,721.34.[4] Petitioner's rent records, dated June 6, 2012, a copy of which was submitted in

[4]That amount includes $1,182.20 for May 2009 which, as noted above, was actually paid in June 2009.

support of its cross-motion for an order striking respondent's rent overcharge defense and claim, and of which the Court takes judicial notice, confirm those payments and, in addition, show that respondent made an additional payment of $1,248.11 in January 2012. Thus, from May 2009 through January 2012, respondent paid petitioner $38,969.45. During that period, she should have paid only $37,332.57. Consequently, from May 2009 through January 2012, respondent was overcharged by $1,636.88.

Given that petitioner presented no proof that its overcharge was not willful, the Court is required to impose treble damages on all overcharges paid since April 2010, two years prior to the date that respondent interposed her overcharge claim. From April 2010 through January 2012, respondent paid petitioner $25,960.86 and should have paid only $24,888.38, an overcharge of $1,072.48. Trebling that amount increases the overcharge penalty for that period to $3,217.44.

From May 2009 through March 2010, respondent paid petitioner $13,008.59 and should have paid only $12,444.19, an overcharge of $564.40. Assessing interest at the rate of 9% per year (*see* CPLR § 5004) from March 1, 2011, a "reasonable intermediate date,[5] to the date of this decision and order (November 20, 2012) results in an additional penalty of $88.20, raising the total penalty from May 2009 through March 2010 to $652.60. Adding that to the treble damages awarded for overcharges paid from April 2010 through January 2012 raises the total overcharge penalties to $3,870.04.

Rent Abatement

After reviewing the testimony and exhibits presented at trial, the Court finds that

[5] Pursuant to Section 5001(b) of the CPLR, where damages are incurred at various times, "interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date."

respondent has met her burden of proving that a number of unsafe and unhealthy conditions existed in her apartment; that petitioner had notice of those conditions; and that petitioner failed to repair those conditions promptly. As a result, petitioner has breached the warranty of habitability and respondent is entitled to a rent abatement.

Although the Court finds that the unsafe and unhealthy conditions have existed in respondent's apartment for more than one year, given respondent's inability to recall when she gave petitioner notice of those conditions and her testimony that a former superintendent saw the conditions at some point "in 2011" when he came to fix a leak in her bathtub, the Court will not award an abatement for conditions in her apartment for any time prior to December 1, 2011. Moreover, while the Court believes that petitioner made insufficient attempts to gain access to respondent's apartment for several months thereafter,[6] it finds that petitioner did request access in writing on or about June 14, 2012; that respondent received that request; and that respondent failed to respond. Coupled with respondent's testimony that "at this point" she does not care about repairs, the Court will not award an abatement for any time after June 2012.

The Court awards respondent an abatement of rent in the amount of $1,357.55, calculated as follows:

- Bathroom ceiling and walls need extensive scraping, plastering, and painting[7]
  10% abatement from 12/1/11 - 6/30/12 = $ 791.91

[6] Although the current superintendent testified that he personally made seven or eight attempts to gain access to respondent's apartment since February 2012, he never attempted to do so after 5:30 p.m. or on weekends, when respondent, who works, would be more likely to be home. Moreover, he also testified that no one from petitioner's office told him to go to her apartment after 5:30 p.m., contradicting the testimony of petitioner's in-house counsel. In addition, although Morris Rubin, a "partner" in petitioner, apparently had respondent's telephone number, having testified that he called her in March 2012 to make an oral demand for rent, none of petitioner's witnesses testified that he or she attempted to call respondent to arrange access.

[7] Although respondent testified that there was mold and mildew in her bathroom, the photographs she submitted in evidence do not substantiate her claim.

• Living room and bedroom ceiling and walls need scraping, plastering, and painting 5% abatement from 12/1/11 - 6/30/12	=	395.92
• Tub and sink enamel eroded 2% abatement from 12/1/11 - 6/30/12	=	158.41
• Gaping hole in lobby ceiling 1% abatement from 7/1/11 - 7/31/11	=	11.31
Total	=	$1,357.55

Rent Due

According to petitioner's rent records, as of April 30, 2009 respondent owed $968.23. Deducting an unexplained beginning balance of $376.60 as of December 31, 2006; $50.91 from the $1,182.20 charged for April 2009 (instead of the $1,131.29 petitioner should have charged); and $475.00 in late fees reduces the rent due as of April 30, 2009 to $65.72.

After assessing overcharge penalties, respondent has a credit of $3,870.04 for the period May 1, 2009 through January 31, 2012. Deducting the rent due through April 30, 2009 reduces that credit to $3,804.32.

From February 1, 2012 through October 5, 2012 (the last day of trial), respondent owed $10,181.61 and paid $4,525.16, an underpayment of $5,656.45. Deducting the credit through January 2012 of $3,804.32 reduces the rent due as of October 5th to $1,852.13, and deducting the rent abatement of $1,357.55 awarded for breach of the warranty of habitability further reduces the amount due to $494.58.

Relief

The Court grants the petition to the extent of directing the Clerk of the Court to enter a final judgment of possession and money judgment in the amount of $494.58 in favor of

petitioner and against respondent. Issuance of the warrant of eviction shall be stayed for five days. It is further

ORDERED that petitioner shall scrape, plaster and paint the walls and ceilings in respondent's bathroom, living room, and bedroom, and repair the eroded enamel in the bathtub and bathroom sink by December 31, 2012. Respondent shall provide access for repairs, and petitioner shall work on those repairs, on December 12 and 13, 2012, from 9:00 a.m. to 5:00 p.m. Workers shall arrive at respondent's apartment, ready to work, by 10:00 a.m. on each access date. All work shall be done in a professional and workmanlike manner. If additional access is required, the parties shall arrange mutually convenient dates.

This order is without prejudice to petitioner's claim for rent due after October 31, 2012 and respondent's claim for a rent abatement after October 5, 2012.

This constitutes the decision and order of the Court.

The parties are requested to pick up their exhibits from Part T by December 21, 2012.

Dated: Bronx, New York
November 20, 2012

Hon. Andrew Lehrer
Judge, Housing Court