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

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405 EAST 56TH STREET LLC

Petitioner

-against-

DECISION & ORDER
Index No.: L& T 68240/2010

HON. SABRINA B. KRAUS

MADELINE BELL
405 EAST 56TH STREET, 7K
NEW YORK, NY 10022

Respondent

_____X

BACKGROUND

This summary nonpayment proceeding was commenced by **405 EAST 56TH STREET LLC** (Petitioner) against **MADELINE BELL,** the rent stabilized tenant of record, (Respondent), seeking to recover possession of 405 EAST 56TH STREET, 7K, NEW YORK, NY 10022 (Subject Premises) based on the allegation that Respondent had failed to pay rent due for the Subject Premises.

PROCEDURAL HISTORY

On or about April 24, 2012, Petitioner issued a three day demand for $2569.06 for April rent. The Notice of Petition and Petition are dated June 4, 2012. On June 20, 2012, Respondent appeared through counsel and filed an answer asserting affirmative defenses and counterclaims, including a request for a fifty percent rent abatement for a period of six months.

The proceeding was originally returnable on June 20, 2012, and was adjourned to

August 7, 2012 for motion practice pursuant to a stipulation.

On August 7, 2012, the court (Stanley, J) issued an order which provided Respondent's first four affirmative defenses and jury demand were withdrawn, and the sixth, seventh, eleventh and thirteenth affirmative defenses were stricken. The order preserved for trial Respondent's warranty of habitability claim, and Respondent's harassment claim. The order denied Respondent's cross-motion for discovery and a preliminary injunction, and adjourned the proceeding to September 14, 2012 for trial.

The court also ordered an inspection on August 7, 2012, which took place on August 14, 2012. Pursuant to said inspection ten violations were placed on the Subject Premises.

On December 11, 2012, the proceeding was assigned to Part R for trial. The parties marked certain documents into evidence on that date. The trial continued on January 14, and 16th, 2013, and February 13, 21, and 27th, 2013, and concluded on March 6, 2013. At the conclusion of trial, the court reserved decision.

FINDINGS OF FACT

Respondent is the rent stabilized tenant of record of the Subject Premises, pursuant to a written agreement dated August 20, 1982 (Ex 4), which was assigned to Respondent per assignment dated May 18, 1983 (Ex 6). The lease was most recently renewed for a period of September 1, 2011 through August 31, 2013, at a rent of $2580.81. Petitioner is the owner of the Subject Building, pursuant to a deed made November 15, 2001 (Ex 1). There is a duly filed multiple dwelling registration dated November 27, 2012 for the subject building (Ex 2). There is $25,796.35 in rent due through January 2013 (Ex 13) which represents rent due for May 2012 through January 2013.

Respondent testified at trial that she withheld rent for three reasons, the conditions in the Subject Premises, noise from a neighboring apartment, and what she perceived as Petitioner's lack of assistance to her in using the service entrance of the building during a period where the lobby was undergoing renovations.

To the extent that Respondent seeks an abatement based on the renovations done to the lobby and common areas of the building, the court finds that Respondent has failed to establish any entitlement to an abatement as a result of same. The renovations were done in a reasonable manner and resulted in an upgraded common facility for all building residents. Respondent's complaints regarding noise from the renovation or having to use the service entrance do not seem reasonable to the court. To the extent that Respondent made any request regarding the service area stair rail, the court finds Petitioner promptly and reasonably accommodated any such request.

Respondent testified that most of the conditions reported in the inspection report from August 2012 were corrected by Petitioner by the end of November 2012. Respondent testified that the violation for improper ventilation and for plastering however were not addressed.

Respondent filed a complaint regarding mice in May 2012. Petitioner provided Respondent with extermination service on May 19, 2012, June 7, 2012, June 21, 2012, and September 2012 , Respondent did not sign up for extermination in August 2012 (Ex J). Respondent testified that she hired her own exterminator in May 2012, and that the infestation stopped completely as of October 2012.

Respondent acknowledged Petitioner provided her with new kitchen cabinets by October 2012.

Petitioner promptly investigated Respondent's claims regarding improper ventilation and determined that the vents were operating properly. The court notes that the test used by Petitioner's agents, holding a tissue to the vent and seeing if it sticks, is the same test used by HPD inspectors (*211 E 46th Owners LLC v Mohabir* 33 Misc3d 1232(A)). The court finds that the ventilation was operating properly based on the credible testimony of Petitioner's witness at trial. Respondent failed to establish at trial that there was remaining work to be done regarding plastering.

To the extent Respondent seeks an abatement based on her allegation that the dogs in 8K barked excessively, or other complaints regarding excessive noise from that apartment, the court finds no credible evidence was presented at trial warranting an abatement for same, and notes that Respondent has two dogs of her own. Respondent's dogs have been heard barking as testified to by her own witness, Stephanie Shafer.

Moreover, Petitioner took prompt steps to have the tenants in 8K address the barking and the barking subsided as a result. The complaints made by Respondent were not reasonable, and Respondent's actions towards the occupants of 8K bordered on harassment. The court credits the testimony of Respondent's own witness Juliette Song, that Respondent complained about barking from 8K, even when there were no dogs or occupants in the apartment, that Respondent sent her brother to 8K at inappropriate hours to harass them and that Respondent referred to Ms. Song as the "oriental girl."

Respondent had a roommate during the periods in question. Respondent collected $1500 per month from her roommates. To the extent that Respondent testified that one such roommate, Zacahry Belida did not pay rent, the court did not find said testimony to be credible.

Respondent advertised for roommates on the internet.

Respondent testified that Petitioner had attempted to gain access to do repairs on at least ten occasions prior to August 2012, and Respondent denied the requests because no advance notice had been provided.

In response to her complaints, Petitioner renovated Respondent's kitchen at a cost of $4700 (Ex 24). Although Respondent asserts the work wasn't completed until November 2012, the work clearly started prior to said date.

In sum, the court finds that Respondent is not reasonable in her position regarding complaints and work in the Subject Premises. She is unreasonable to the extent she asserts conditions such as the top step on the service entrance, or the barking of neighbors dogs should result in an abatement. She is unreasonable in her restrictions on granting access to the landlord to address her complaints. She asserts and entitlement to a 50% abatement when she was collecting $1500 per month from roommates. In discussing the standard for evaluating a breach of warranty of habitability claim the Court of Appeals, citing its prior decision in *Park W Mgt Corp v Mitchell* (47 NY2d 316) held:

> We specifically rejected the contention that the warranty was intended to make the landlord "a guarantor of every amenity customarily rendered in the landlord-tenant relationship" and held that the implied warranty protects only against conditions that materially affect the health and safety of tenants or deficiencies that "in the eyes of a *reasonable person* ... deprive the tenant of those *essential functions* which a residence is expected to provide (*Solow v Wellner* 86 NY2d 582, 588)."

The only conditions which were clearly established by Respondent were the reported violations from HPD. However, Respondent did not present evidence that these conditions had a significant impact on her use of the premises, rather the primary focus of Respondent's case

was on the conduct of her neighbors in 8K and the renovations done to the building lobby.

> However, a simple finding that conditions on the lease premises are in violation of an applicable housing code does not necessarily constitute automatic breach of the warranty. In some instances, it may be that the code violation is de minimis or has no impact on habitability. Thus once a code violation has been shown, the parties must come forward with evidence concerning the extensiveness of the breach, the manner in which it impacted upon the health, safety or welfare of the tenants, and the measures taken by the landlord to alleviate the violation (*Park West Mgt Corp v Mitchell*, *supra*, at 328).

Here the landlord received notice of the HPD violations in August when Respondent made her inspection request. Respondent failed to establish clearly putting Petitioner on notice of a request for the work ultimately done to correct violations at any time prior to August 2012. There is one document in evidence which purports to be written notice of the cabinet under the kitchen sink, but it is barely legible has no year attached. After being given notice in August, Petitioner immediately sought access to address Respondent's complaints (Exs 20 & 21). Respondent refused to provide access unless the request went through her attorney's office. Her attorney refused to provide access prior to 2pm on any given day, and then would only agree to one day at a time (Exs mm & ll).

Additionally, Respondent's continued ability to collect $1500 per month from her roommates establishes that she had no damages and is prima facie evidence that the value of the Subject Premises did not decrease as a result of any alleged conditions.

> In as much as the duty of the tenant to pay rent is coextensive with the landlord's duty to maintain the premises in a habitable condition, the proper measure of damages for breach of the warranty is the difference between the fair market value of the premises if they had been as warranted, as measured by the rent reserved under the lease, and the value of the premises during the period of the breach (*Id* at 329).

Here Respondent collected $1500 per month from those renting a room in her apartment and has paid no rent to Petitioner for one year.

Finally, the court found no credible evidence that Respondent was harassed by Petitioner.

CONCLUSION

Based on the foregoing, the court finds Respondent failed to establish an entitlement to a rent abatement and that all necessary repairs in the Subject Premises have been completed. Respondent's remaining defenses and counterclaims are dismissed. Petitioner is awarded a final judgment in the amount of $25,796.35 for all rent due through January 2013. Issuance of the warrant is stayed five days for payment.

This constitutes the decision and order of this Court.[1]

SABRINA B. KRAUS

Dated: New York, New York
March 13, 2013

TO: Jeffrey M. Goldman, Esq.
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[1] Parties may pick up their exhibits from the second floor clerk's office, Window 9, within thirty days. After said date exhibits may be destroyed in accordance with administrative directives.

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