Peekskill Hous. Auth. v Zambrano
2019 NY Slip Op 31472(U)
May 28, 2019
Peekskill City Court, Westchester County
Docket Number: LT-091-19
Judge: Reginald J. Johnson
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LT-091-19

PEEKSKILL CITY COURT
COUNTY OF WESTCHESTER: STATE OF NEW YORK
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PEEKSKILL HOUSING AUTHORITY,

DECISION & ORDER
Petitioner-Landlord, Index No. LT-091-19

--against--

EMILY ZAMBRANO,

Address: 696 Highland Ave, Apt. 3-B
Peekskill, New York 10566

Respondent-Tenant(s).
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REGINALD J. JOHNSON, J.

Petitioner, Peekskill Housing Authority, (hereinafter "landlord"), by Katz & Klein, Esqs., by Gerald M. Klein, Esq., brings this non-payment proceeding against Emily Zambrano (hereinafter "tenant") who resides at 696 Highland Ave, Apt. 3-B, Peekskill, New York 10566 ("subject premises"). The tenant is represented by Frank A. Catalina, Esq.

In deciding this matter, the Court considered the testimony of the parties, the pleadings, Petitioner's Exhs. 1 and 2, and Respondent's Exhs. A through D.

Procedural History

The Landlord commenced this nonpayment proceeding on February

14, 2019. On February 26, 2019, the parties appeared, and the case was adjourned to March 5, 2019 on consent. On March 5, 2019, Frank A. Catalina appeared on behalf of the tenant and the matter was adjourned on consent to March 12, 2019 and to March 26, 2019. On March 26th, this matter was scheduled for trial on April 2, 2019. On April 2 prior to trial, the landlord moved to amend the petition to add March and April 2019 rents in the sum of $722.00[1] for a total rental arrears of $2556.00. The tenant paid $556.00 in Court and the parties stipulated that only $2,000.00 in rent arrears was in dispute. After settlement discussions proved unsuccessful, this matter proceeded to bench trial.

Trial Testimony

I. Testimony of Emily Zambrano

The tenant testified that she has been the tenant of record at the subject premises for approximately 4 ½ years pursuant to a written lease. Pursuant to terms of the lease, heat and hot water were included in the rent, but she was responsible for the gas charges. The landlord also provided the tenant with a stove. In or about the month of December 2018, her apartment received no gas and only sporadic heat and hot water most of the day during the entire month. On December 25 and 26, her apartment received no gas, heat or hot water for the entire day. In the month of

[1] The rent for March and April is $361.00 per month.

January 2019, her apartment received no gas and only sporadic heat and hot water during most of the month. In the month of February 2019, the tenant again received no gas and only sporadic heat and hot water during most of the month. The tenant stated that due to the coldness in her apartment, she had to send her children to Poughkeepsie to stay with relatives.

On or about December 2, 2018, the landlord provided the tenant with hot plates for cooking. On December 15 or 16, the landlord provided the tenant with a convection oven. The tenant stated that she incurred increased electric Con Edison charges due to the high electric consumption from the hot plates and the convection oven (see Respondent's A-C). The tenant stated that full service was restored on March 15, 2019.

II. Testimony of Christopher Travis

Mr. Chris Travis testified on behalf of the landlord; he is the Maintenance Supervisor at the subject premises. He has been employed with the landlord for 8 years, and his job duties include supervising employees, reviewing jobs and/or projects and handling work orders. Mr. Travis testified that the landlord received a call from the Peekskill Fire Dept regarding a gas smell at the subject premises in or about November 2018. The Fire Dept. and Con Edison arrived at the subject premises and directed the landlord to turn off the gas until the location of the gas leak could be identified. Con Edison determined that there was a leak in the

gas lines between buildings A-B and B-C that needed to be replaced. The landlord anticipated that the gas would be turned off to the entire complex for approximately 10 days so that the gas lines could be replaced (see Pet's 1). However, after the landlord replaced the initial gas lines it was determined that additional gas lines needed to be replaced. Because the landlord had to go to public bid to hire a contractor to replace the additional gas lines, the landlord could not give an estimate on how long the repair work would take, so the landlord provided all affected tenants with convection ovens on December 15 and 16 (see Pet's 2).

Mr. Travis further testified that Con Edison informed the landlord that the gas lines were in a state of level 4 corrosion and therefore needed to be replaced. During the repair work, the landlord arranged for the boilers to be converted to propane to provide gas and heat. Mr. Travis stated that between early December 2018 through early January 2019, there were only ten heat/hot water interruptions that resulted in a maximum of 8 hours of lost heat/hot water, and that the repairs were usually completed within 2 to 3 hours after notification. When asked if he had reviewed any complaint/call logs, Mr. Travis said that he did not.

Arguments of the Parties

The tenant argued that the landlord failed to provide her and her three children with basic services during the coldest months of the year. She argued that she was without gas for 10 consecutive days before additional gas leaks were discovered. She further argued that the level 4

corrosive state of the gas pipes was proof that the landlord was grossly negligent in failing to maintain the gas lines to the apartment complex, and that the Court should award an abatement commensurate with the actual lack of services. The landlord argued that it did not have prior notice of any defects in the gas line[2], that the gas outage was of minor duration, and that the landlord's Maintenance Dept. does not maintain the gas lines—Con Edison does. Further, the landlord argued that since its staff did not have the ability to monitor the gas lines, it was not grossly negligent.

Discussion

In New York State, every landlord who leases residential premises to a tenant covenants and warrants that the premises are "fit for human habitation and for the uses reasonably intended by the parties, and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their live, health or safety" (see NYS Real Property Law (RPL) §235-b "Warranty of habitability"). A landlord warrants that the leased premises will be maintained in a safe, habitable condition, even where an unsafe condition may be caused by the acts of third parties; hence, where a landlord fails to take steps to eliminate a breach of the warranty of habitability caused by a third party, the aggrieved tenant may be entitled to a rent abatement

[2] Mr. Travis testified that the landlord was not aware of any defects in the gas lines until it was notified by Con Edison, and after a post repair pressure test failed, indicating that other gas lines were compromised and needed to be repaired.

(see *Sargent Realty Corp. v. Vizzini,* 101 Misc.2d 763 [N.Y. City Civ. 1979]). It was undisputed at the trial in the case that the tenant was entitled to receive gas, heat and hot water as an occupant of the subject premises. The tenant alleged that the landlord breached the warranty of habitability when it failed to provide gas to her apartment for 10 consecutive days, and intermittent heat/hot water for approximately three and a half months.[3] The landlord disputed the tenant's time frames. Further, the landlord argued that it was not aware of the leaking gas lines until Con Edison notified it; that its maintenance department personnel had no means of monitoring Con Edison's underground gas lines; and that, therefore, it was not negligent in causing and/or failing to detect the gas leak. To prove a breach of an implied warranty of habitability, the tenant need not show that the landlord acted in bad faith or contributed to the defective condition of the premises (see *McGuinness v. Jakubiak,* 106 Misc.2d 317, 324 [Sup. Ct. Kings Co. 1980]). Further, the tenant could assert warranty of habitability rights without the need to give the landlord prior written notice (see *Matter of Jorden, 8 Misc.3d 789 [Sur. Ct. N.Y. Co. 2005]),* although she testified that she called the landlord's after hours number and left a message regarding the lack of gas, hot water/heat on the day her apartment did not receive it.[4] Lastly, the scope of the warranty of habitability encompasses "conditions caused by both latent and patent

[3] The parties stipulated that full services were restored to the subject premises on March 15, 2019.
[4] The landlord would be hard pressed to argue that it was not aware of the gas leak affecting the tenant's apartment as well as the entire complex, because the landlord was duly notified by Con Edison of the gas leak. In fact, Mr. Travis testified that the landlord was aware of a problem with the gas lines at Dunbar Heights in November 2018.

defects existing at the inception of and throughout the tenancy" (*McGuinness v. Jakubiak,* 106 Misc.2d at 322). That the Con Edison gas lines were underground and beyond the landlord's ability to monitor them is irrelevant and the landlord can still liable under the warranty of habitability.

The pre-eminent issue for the Court in this case is not whether there was a breach of the warranty of habitability—which the Court so finds, but how much, if any, of a rent abatement is the tenant entitled. The lack of gas and intermittent heat/hot water for approx. 3 ½ months in the tenant's apartment supports a claim for breach of the warranty of habitability. In determining the amount of damages sustained by a tenant due to breach of the warranty of habitability, expert testimony is not required (RPL §235-b). The case law appears to hold that the amount of an abatement is case specific and dependent upon the time period and severity of the breach (see *Parker 72nd Assocs v. Isaacs,*109 Misc.2d 57 (NY City Civ Ct. 1980) [50% abatement for lack of hot water (20%) and heat (30%)][5]; *Collins Estate Corp. v. Beader,* N.Y.L.J., Apr. 9, 1987, p. 14, col. 1 (App. Term, 1st Dept.) [25% abatement over eight months granted for leaks]; and *Goldman v. O'Brien,* N.Y.L.J., Aug. 14, 2000, p. 28, col. 3 (App. Term, 1st Dept) [50% abatement based on emanation of noxious fumes from dry cleaners located below apartments]; *Steltzer v. Spesaison,*

[5] In *Parker,* the evidence showed that during a three-month period of winter there were 17 instances of no heat and 13 instances of no hot water in plaintiff's apartment building, which lead to a 50% abatement (20% for no heat and 30% for no hot water) in the absence of proof from the landlord establishing a lesser appropriate abatement.

161 Misc.2d 507 (N.Y. City Civ. Ct. 1994) [5% abatement due to leak and falling plaster in living room, since collapsed water-damaged ceiling in landlord's apartment was shown to be source of tenant's damage]; and *Ludlow Props., LLC. v. Young,* 4 Misc.3d 515 (N.Y. City Civ. 2004) [45% abatement for bedbug infestation]).

The measure of damages for breach of the warranty of habitability need not be established with mathematical certainty. Nonexpert testimony is permitted and thus a tenant may testify not only as to her factual observations but also as to the impact of the conditions described in her daily life (see *Park West Management Corp. v. Mitchell,* 62 A.D.2d 291 [App. Div. 1st Dept., 1978]). In the case at bar, the tenant testified that her apartment became so unbearably cold that she had to send her children to Poughkeepsie to stay with relatives. An abatement based upon the implied warranty of habitability pursuant to Real Property Law §235-b protects only against conditions that materially affect the health and safety of the tenant or deficiencies that in the eyes of a reasonable person deprive the tenant of those essential functions which a residence is expected to provide (see *Solow v. Wellner,* 86 N.Y.2d 582 [1995] quoting *Park W. Mgt. Corp. v. Mitchell,* 47 N.Y.2d 316 [1979]). Accordingly, the Court also finds that the landlord breached the warranty of habitability by failing to provide the tenant the essential functions which a residence is expected to provide—i.e., gas and heat/hot water.

The monetary basis for calculating a rent abatement due to a Section

8 tenant based on the landlord's breach of the warranty of habitability is the full contract rent, defined in federal regulations as the sum the landlord received both from the Department of Housing and Urban Development [HUD] (or through public housing agencies) and from the tenant, which reflects the fair market value of the apartment (see *Committed Community Assocs. v. Croswell,* 250 A.D.2d 845 [App. Div. 2d. Dept. 1998]). However, where the tenant's rent is partly paid by HUD (or Section 8), the tenant may not recover on her warranty of habitability claim more than her share of the rent (see *Committed Community Assocs. v. Croswell, 171 Misc.2d 340* [N.Y. App. Term, 2d Dept. 1997]). The Court notes that the landlord took remedial action after it was notified of the gas leaks; specifically, the landlord provided hot plates to affected tenants on or about December 2, 2018 and convection ovens on or about December 15 or 16, 2018, and submitted requests for proposals (bids) with all deliberate speed to obtain contractors to convert the boilers to propane and to repair the gas leaks. Therefore, the following abatements are hereby awarded to the tenant: 50% ($278.00) abatement of the rent for the month of December 2018; 50% ($180.50) abatement of the rent for the month of January 2019; 50% ($180.50) abatement of the rent for the month of February 2019; and 50% ($180.50) abatement of the rent for the month of March 2019 ($180.50) for total rent abatement of $1000.00.[6]

[6] Although the parties appeared to contest the rent for month of April 2019, it was stipulated by the parties that full services were restored to the subject premises on March 15, 2019. Therefore, unless the tenant has some other defense to its payment, the tenant owes $361.00 for April's rent.

Any other arguments raised by parties and not addressed in this Decision and Order were considered and deemed moot.

Based on the foregoing, it is

Ordered, that the tenant is awarded a rent abatement of one thousand dollars ($1000.00).

The foregoing constitutes the Decision and Order of the Court.

_____
Hon. Reginald J. Johnson
City Court Judge

Dated: Peekskill, NY
May 28, 2019

Judgment entered in accordance with the foregoing on this ____ day of May, 2019.

_____
Concetta Cardinale
Chief Clerk

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