108 Lincoln Place, LLC v Garratt

2023 NY Slip Op 30159(U)

January 13, 2023

Supreme Court, Kings County

Docket Number: Index No. 510053/2016

Judge: Wavny Toussaint

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At an I.A.S. Trial Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 13th day of January, 2023.

P R E S E N T :
HON. WAVNY TOUSSAINT
Justice

108 LINCOLN PLACE, LLC

Plaintiff

-against-

RODNEY GARRATT and JADA GARRATT

Defendants

Index No: 510053/2016

DECISION AND ORDER AFTER TRIAL

Plaintiff 108 Lincoln Place, LLC, by its principal member John Hetherman, (hereinafter Hetherman) commenced the instant action against the defendants Rodney Garratt (hereinafter R Garratt) and Jada Garratt (hereinafter J Garratt) (collectively defendants), asserting causes of action for breach of contract, loss of rent and property damage. The crux of the action is the alleged breach of a residential lease dated June 10, 2014, for the premises known as 108 Lincoln Place, #1, Brooklyn, New York. The complaint alleges that defendants vacated the subject apartment before the end of the lease term, resulting in lost rent and damages to the plaintiff. In their answer, defendants assert affirmative defenses and counterclaims alleging harassment, breach of the duty of habitability, partial actual eviction, constructive eviction and breach of contract. The defendants also seek reimbursement for legal fees.

A Bench Trial was held by this Court, at which Hetherman, plaintiff's principal, and defendants R and J Garratt were the only witnesses. Thereafter the parties submitted Findings of Fact and Conclusions of Law. The following is the decision of this court.

Stipulated Facts and Trial Evidence

Prior to any trial testimony, the parties placed a stipulated set of facts on the record as follows:

> At all times relevant to the action, the plaintiff was and still is the owner of 108 Lincoln Place, Brooklyn; the defendants' lease commenced on 8/1/2014; the lease had a termination date of 7/31/2016; the monthly rent was $6,250; the defendants surrendered their interest and returned the keys on 11/24/2015; monthly rent was not paid for October, 2015; defendants stopped payment on the rental check for October, 2015; monthly rent was not paid from November 2015 through February 2016; the lease had a security deposit of $6,250; the plaintiff entered a subsequent lease on 1/20/2016; the monthly rent for the subsequent lease was $5,950; the rent commencement in the subsequent lease was 3/1/2016; the monthly rent in the subsequent lease was $300 per month less than in the defendants' lease; the alleged unpaid base rent is $32,750.00.

The parties also consented to the admission in evidence of the following documents.

For plaintiff:

1. A letter dated 12/17/2015, from Scott Miller, Esq to Evan Nahins, Esq.
2. The lease between the parties, dated 6/10/2014.
3. The lease between the plaintiff and the Goldsteins, dated 1/20/2016.
4. A stop payment notice dated 10/22/2015 from Bank of America.
5. The exclusive rental agreement for the subject premises, dated 12/18/2015.

For defendants:

A. Kenneth Cera email dated 7/1/2014 to John Hetherman and Jada Garratt.

B. Jada Garratt email to John Hetherman, dated 7/27/2014.

C. Kenneth Cera email to Jada Garratt, dated 7/27/2014.

Trial Testimony

Hetherman, is the sole shareholder of 108 Lincoln Place, LLC, the registered owner of 108 Lincoln Place, which has owned the premises since 2007. Hetherman lives in Michigan, and for day-to-day management of the premises, he has a tenant building manager who lives at the premises, another tenant building manager from another building a few blocks away, and various maintenance people. He does not use the services of a formal management company.

108 Lincoln Place is a four-story townhouse, consisting of a lower duplex on the garden and parlor floor levels with exclusive access to the backyard, two apartments on the third level and one apartment on the fourth level. Defendants occupied the lower duplex. As, the prior tenant, Ken Cera was relocating before the expiration of his lease, Hetherman had Tammy Shaw from Shaw Realty show defendants the apartment. Hetherman did not meet the defendants in person prior to their moving into the unit, but he did speak with them on the telephone to "tell them the situation of the building." The prior tenant vacated the apartment on the 24th, of July and the defendants moved in the following day. Hetherman opined he was not "obligated" to make any repairs to the apartment and noted that three days after their move, defendants, sent an email stating that they "really love" the subject apartment.

According to Hetherman, during the 16 months that the defendants resided at the premises, he visited the building three times. The first visit was in September 2014, approximately 1 ½ months after defendants moved in, to take care of an issue in the basement. It was the first time he met defendant J Garratt. Upon his arrival, he rang the doorbell and stated that he was there for the basement. He was let in. He went into the basement and cleared out some items. J Garrat then gave him a list of ten items that

needed repair. They discussed the items which Hetherman described as nothing really significant. During the visit, he looked in the backyard, and noted it was in shambles, with dog poop everywhere. He also observed defendants were using the rear room as a kennel.

Hetherman returned to the premises the next day, to again check on something in the basement. After entering the basement with Eddie, one of his workers, J Garratt locked him in the basement. Hetherman believed that defendants were upset because some of their items had been removed from the basement. J Garratt called the police, and Hetherman and Eddie were let out of the basement. Hetherman explained he wanted to bring a false imprisonment charge against the defendant but, was advised by the police that such a charge was a "civil matter."

Six months later, in April 2015, Hetherman sent workers over to the premises to do some "preventative maintenance" on the outside steps. He had received texts and emails from the defendants, stating "the stairs are falling down. We want a licensed contractor. We want this done. We want that done." He sent workers to perform "simple pointing" on the steps, but J Garratt would not allow them to work. As a result, he came to the premises himself. He hired a licensed contractor to repair the steps, but the defendants still were not satisfied, so he ended up having to personally supervise the repair work for the steps.

When Hetherman came to the premises to repair the steps, J Garrat would not grant him access to the cellar through their apartment. Hetherman, then crawled through the coal chute, located in the front of the building, which he described as "the hole in the ground," to get into the cellar. This was "extremely dangerous." He then proceeded to make his way to the top of the staircase (which led to the defendants' apartment) and knocked on the door. J Garrat opened the door, but then slammed it on him, causing him to fall down the stairs.[1] The police and the fire department were called, and Hetherman was removed to the hospital.

[1] This alleged incident is the subject of an action entitled *Hetherman v Garratt,* pending in Supreme Court, Kings County [506729/2016].

Defendants moved out of the premises, in November 2015. Hetherman went to the apartment about four days after they vacated. From his observation the condition of the apartment looked good, except for the rear room. The floors in that room were stained with and smelled of urine. As a consequence he engaged the services of F&D Home Improvements, Pedulla Ceramic Tile and Ali Moving and Hauling to do repairs in the subject unit. F&D and Pedulla were paid by check ($1,560 and $440, respectively) and Ali Moving was paid in cash ($350.00).[2] Copies of the checks and receipt were admitted into evidence, without objection. Hetherman was not reimbursed by the defendants for the cost of the repairs and never received any of the $32, 750.00 in unpaid rent.

On cross-examination, Hetherman acknowledged that although the verified complaint alleges that he incurred $36,355 to put the premises in good repair, he testified to spending only $2,350.00 on the apartment following the defendants' departure[3]. He also confirmed that he was holding a security deposit in the amount of $6,250. Hetherman was unaware that the apartment in question was marketed and rented to the defendants as a duplex, with full use of the basement for laundry and storage. He emphasized that the prior tenant did not have use (exclusive or otherwise) of the basement. He explained that although there was an old washer and dryer in the basement, the defendants were not permitted to use them.

Hetherman could not recall the last time he had seen the apartment before the defendants moved in; but, since he normally came to New York three to four times a year, he was probably in the apartment two times during the last year of the prior tenancy. He acknowledged that shortly after the defendants moved into the premises, they sent an email detailing a list of conditions that needed repair/attention, which included the floor in the rear room, mold in the basement and the presence of mice. After receiving the email, he came to New York. Although he could not recall if he told the defendants that he was planning to come over to the premises, he denied letting himself into the apartment, unannounced to investigate the mold condition. Hetherman claimed he rang

[2] Plaintiff's Exhibits 10, 11 and 17.
[3] On the record, the plaintiff waived his right to collect any more money for damage to the property.

the bell and introduced himself to J Garratt as the landlord, without either pushing his way into the apartment or walking directly to the basement.

Hetherman did not hire anyone to inspect for mold, did not observe any mold, and does not know for certain if there was mold in the basement. He denied telling the defendants not to store anything on the floor of the basement because the basement was wet, but did instruct his worker Eddie to remove items left by the prior tenant and some items owned by him from the basement. Although he observed items belonging to the defendants in the basement, he did not recall if he told them not to use the basement at that time. He denied removing the defendant's belongings from the basement and placing them on the street. To his knowledge, the washer and dryer in the basement remained there for the duration of the defendants' tenancy and were never disconnected.

Hetherman denied ever forcing his way into the defendants' apartment and ripping the chain off the doorframe in the process. However, in October 2015, he was notified by other tenants in the building that there was no heat. He drove to Brooklyn, visiting the premises the next day, and insisted that he told the defendants that he was coming. Nonetheless, upon his arrival at the building, R Garratt refused to open the door and was "standing there holding his camera." Hetherman then used his key in an attempt to open the door, but realized, that the defendants had put on a chain lock without telling him. He pushed the door in, breaking both the chain lock and the molding around the door. Hetherman went to the upstairs apartment and saw a pool of water by the radiator. He went to the cellar and shut off the water. He then removed the door handles from the door that leads from the lower floor of the apartment down into the cellar. He explained that he did not want to be locked in the basement again by J Garratt.

The following day, Hetherman relocated the building thermostat from the defendants' apartment to another apartment in the building. When asked why he changed the thermostat location, Hetherman stated it was too difficult to get access to the defendants' apartment, making it difficult to control the heat within the building. The following day, he attempted to gain access to defendants' apartment, to install smoke detectors, but was denied entry. He did not recall if R Garratt told him access was denied because the unit already had a smoke detector.

Hetherman acknowledged he told the defendants that if they were not happy in the apartment, they should "find another place." He also offered to work something out with them. He described the relationship with the defendants as "bad" with a lot of animosity when they spoke to one another. He further acknowledged that the defendants accused him of harassing them and interfering with their enjoyment of the apartment. However, he denied ever having an encounter with either of the defendants' children and, denied removing any of the defendants' items from the basement and placing them on the street. Aa to the mouse problem in the premises, Hetherman said that he sent over an exterminator, advised the defendants against "free feeding" their dog, and suggested they place a cover on their garbage pail.

Defendant J Garratt testified next. Prior to moving into the apartment, defendants were shown the living room, the back bedroom, the yard, the upstairs and the basement, which had a laundry that was exclusive to the unit. The testimony thereafter focused on the affirmative defenses/counterclaims for harassment, breach of the warranty of habitability, partial and constructive eviction and attorney fees; and to establish why no rent was due. According to J Garratt plaintiff Hetherman repeatedly requested and thereafter demanded that they vacate the subject apartment and terminate the lease. In March 2015, they were not able to get into their apartment, because of an issue with the iron gate and the stoop. The staircase and the stoop had allegedly shifted, preventing entry to the apartment. Hetherman sent over several cement people to patch the stairway, but from defendants' perspective, the condition of the steps was dangerous. Hetherman told J Garratt to "mind her own business" and used profane language regarding her husband. Hetherman also told defendant that he was going to sue and evict them. Defendant J Garratt in turn threatened to call the City and to file a complaint.

Turning to the harassment counterclaim; J Garratt stated that upon defendants notice about the mold condition, Hetherman advised that he was sending an unidentified mold remediation company to look at it. Later that morning, the doorbell rang and J Garrat went to answer it. When the door opened, Hetherman, along with another man pushed her to the wall and entered the apartment. After being asked twice, Hetherman identified himself as the landlord. J Garrat described the situation as "terrifying," to the point she instructed her daughters to lock themselves in the back room. Additionally,

during the course of the tenancy, Hetherman would call and threaten to sue and evict the defendants and to make their lives "miserable." Hetherman also threatened sexual violence against defendant R Garratt.

According to J Garratt there were also issues with essential services in the apartment, as they went without heat in October and November of 2015. Defendants had emailed the plaintiff and requested that the heat be turned on. In response Hetherman came to the building and attempted to turn on the heat. He apparently did not know what he was doing and overfilled the boiler. A plumber had to come to the building the next day.

With regard to the fourth affirmative defense and second counterclaim (breach of the warranty of habitability), J Garratt asserted that the conditions detailed in this defense[4] were all present during the term of their tenancy and impacted on her family's enjoyment of the premises. Although initially Hetherman indicated that he would take care of any problems, after defendants began to complain about the mold condition, he stated that he would not repair anything.

With regard to the fifth affirmative defense[5] (partial actual eviction), J Garratt testified that after she complained to the City about the condition of the building stoop, Hetherman removed their personal items from the basement. He also harassed the defendants' daughter by blocking her path when she was attempting to exit the apartment. According to J. Garrat, Hetherman threatened sexual violence against her husband and threated to call her husband's employer (The Federal Reserve) and tell them what a terrible person he was.

The defendant testified that during the time of the front stoop repair, Hetherman sent her a text, advising that the defendants would not be able to exit the building through the only door for which they had been provided a key. Feeling "trapped," she called the police. A little while later, she heard strange noises coming from the basement. She

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[4] Severe mold in the basement; lack of heat; leak and water damage from radiator; damaged and unsafe entry stairway; mice and/or rat infestation; holes in floors and damaged floorboards; damaged floors in kitchen and living room; water damage in upstairs closet; holes in upstairs ceiling closet; peeling paint and holes throughout; inoperable smoke and carbon monoxide detectors; cracked beam in kitchen ceiling; thermostat ripped from wall; improperly run wires to upstairs unit.

[5] The pleadings list this as the Fifth Affirmative Defense and Third Counterclaim.

initially thought that the work being performed on the stoop caused mice and/or rats to enter the basement. J Garratt opened the door to the basement and saw Hetherman standing there. She immediately closed the door and called the police again. Hetherman was heard yelling "I will sue you. I will evict you. I will f... your husband again." After the police arrived, J Garratt observed "all of our stuff" from the basement on the street. Allegedly, Hetherman then faked an injury, which resulted in his being removed from the basement, on a stretcher, by the Fire Department.

Extended testimony followed concerning numerous documents (Defendants' Exhibit A - QQ) which were admitted in evidence. Exhibit A was a copy of a July 1, 2014 email between Kenneth Cera, the former tenant, the plaintiff and the defendant regarding the lease commencement and when the defendants could move into the premises. Exhibit B was an email chain from July 27, 2014 to July 30, 2014, between the plaintiff and defendant about the mold condition in the building. Defendants' C was a July 27, 2014 email exchange between former tenant Cera and the defendant, indicating that the plaintiff was aware of the smoke alarm and mouse issue in the building. Defendant's D was an August 2, 2014 email exchange between the defendant and former tenant Cera, regarding issues the defendants were having with the plaintiff. Defendant's E was an August 5, 2014 email from the defendant to the plaintiff, detailing repairs needed in the apartment with two photographs attached. The first photo showed mouse droppings under the kitchen sink. The second photo showed floor damage in the rear room. J Garratt testified that Exhibit E was a true and accurate account of the conditions the defendants encountered when they moved into the subject apartment. This exhibit included an August 7, 2014 email from Damon Myers, who described himself as a tenant, who was attempting to mediate between the plaintiff and defendant.

Defendant's F was an August 15, 2014 email from former tenant Cera to the defendant, wherein he expresses hope that there have been "no more invasions," and asked about his mail. Exhibit G was an August 20, 2014 to August 26, 2014 email exchange between Rodney Garratt and Damon Myers, regarding the conditions in the apartment. Specifically, the email from defendant R Garratt indicates that the damage to the floors was pre-existing. The reply email from Mr. Myers states, among other things, that the plaintiff is permitting the defendants to use the basement in its "as is" condition and suggested that items not be stored on the floor because the basement is damp.

Defendant's H was an email from August 5, 2014 through September 18, 2014 between the defendants and the plaintiff. J Garratt testified that the email from the plaintiff dated September 16, 2014, was the first time they were notified that they could not use the cellar. Further, this email indicated that the defendants were in violation of the lease because they moved in prior to the lease date and failed to permit the landlord access to make repairs. The email also responded to the concerns raised in the defendants' initial email to the plaintiff. Defendant's I was a September 24, 2014 email from R Garratt to the plaintiff, again listing items in the apartment that needed repair. J Garratt testified that some of the items complained of (the toilet and the leaking kitchen sink) were repaired, but the mouse infestation persisted.

Defendant's J was a March 3, 2015, text exchange between J Garratt and the plaintiff, with a copy of a check in the amount of $125 from Hetherman, to J Garratt, as reimbursement for payment to an iron works company. According to J Garratt, the iron works company was called because the stoop was putting pressure on the iron door leading into the defendants' apartment. Defendant's Exhibits K through N were email and text message exchanges with photographs from April 8, 2015, to April 25, 2015, between J Garratt and the plaintiff regarding the condition of the apartment steps and access required to look at and repair them. J Garratt further claimed that during April 2015, Hetherman removed some of their belongings stored under the stoop.

Defendant's Exhibit O was a text message exchange dated April 28, 2015, between J Garratt and a neighbor. No questions were asked about Exhibit P, a text message from the plaintiff, advising the defendants that they would need to use the upper entrance to the apartment while repairs are being made to the stoop. Exhibit Q was an April 28, 2015, to May 18, 2015, email exchange between the defendants and the plaintiff. The defendants re-sent the list of repairs that were requested upon moving into the unit. The plaintiff's response advises the defendants that they are not permitted to use the basement, and any items left there after May 22, 2015, would be discarded. Exhibit R was a forwarded May 18, 2015, email from the defendants' real estate broker to the plaintiff, regarding the listing agreement for the apartment and what was included in the rental; specifically, the use of the basement for storage and a washer and dryer.

Defendant's Exhibit S was an October 18, 2015, to October 19, 2015, email exchange between the defendants and Hetherman, relating to the lack of heat in the

premises. Hetherman's response referenced an active restraining order against defendant J Garratt. When asked about the restraining order, it was explained that Hetherman had J Garratt arrested, after telling the police that she pushed him down the basement stairs. She received an 'ACD' (Adjournment in Contemplation of Dismissal) with a six month order of protection in favor of Hetherman. Exhibits T and U were October 20, 2015, and October 23, 2015, email exchanges between the plaintiff and R Garratt, regarding access to the apartment for repairs. No questions were asked about Exhibits V an October 24,2015 email from plaintiff to R Garratt; and W, also from the plaintiff to the Damon Myers and R. Garratt both titled "Unauthorized Storage – item removal required."

Defendant's Exhibit X was an October 15, 2015, email from Hetherman to R Garratt and copied to Damon Myers, regarding a stop payment order for the October 2015 rent. When asked why payment was stopped, R Garratt stated that they were scared in the apartment, in light of the fact that Hetherman had just busted through their door; and that her family slept with "stuff in front of the door", in case Hetherman attempted to enter. No questions were asked about Exhibits Y (a memo entitled "Landlord Harassment Episode: October 2015") and Z (an email from plaintiff to defendant, dated November 24, 2015, requesting access to the apartment for repairs). Both reflect a deteriorating relationship between plaintiff and defendants.

Defendant's Exhibits AA and BB were text messages between the defendant and her neighbors on April 25, 2015 and April 29, 2015, regarding issues the defendants were having with Hetherman. Exhibit CC was a locksmith bill dated April 30, 2015. Exhibit DD was the rent check for May, 2015, which reflected a reduction for the locksmith bill. Exhibit EE were copies of checks paid to the real estate broker and the plaintiff, prior to the commencement of the lease. Exhibit FF was an estimate from Big Apple Mold Remedial Inc;[6] after they viewed the mold condition in the basement. Exhibit LL was the lease for the subject premises between the parties.

Exhibit MM were copies of a police report regarding J Garratt's arrest on April 30, 2015. J Garratt further testified that during the tenancy period, she called the police to the premises on three occasions; all of which involved Hetherman. No questions were

[6] Exhibit FF was not admitted in evidence.

asked relative to Defendant's NN, a copy of the NYC Department of Buildings ECB Violations for performing construction work without a permit. Exhibit OO was a text message from J Garratt to Tammy Shaw, indicating that she could open the office the following day, but could not stay, because Hetherman was harassing and threatening them.

Defendants' Exhibits PP 1-134 are photographs taken by the defendants. J Garratt was asked to describe what was depicted in various photographs. Exhibit PP-21 was described as the garden area when the defendants moved into the premises. Exhibit PP-22 was described as the drilled door lock on the front door to the premises. Exhibits PP-24 and PP-25 show the defendants' property which was thrown out by Hetherman. Exhibit PP-26 was a picture of the removed thermostat and the wires that Hetherman ran up the walls and out to the staircase. Exhibit PP-31, PP-32 and PP-34 were photographs taken under the defendant's kitchen sink upon moving into the apartment; the blue pellets were rat poison with evidence of rat droppings. J. Garratt claimed Exhibit PP-36 shows mold in the unit; and Exhibit PP-37 shows a box which deteriorated due to moisture and mold.

Exhibit PP-40 depicts the steps that were "falling apart" and the iron gate leading to the defendants' apartment. This was the same gate that needed the iron work repairs. Exhibit PP-42 is a picture of the washer and dryer that were used by the defendants. J Garratt testified that she believed the washer and dryer were removed. She later realized that Hetherman just disconnected the units and moved them to another location in the basement. This was done on April 30, the same day he entered the premises without the defendants' knowledge. Exhibit PP-48 is a photograph of the stairs leading from the garden level to the basement. Exhibit PP-64 and PP-66 depict the cement company fixing the stairs and a temporary staircase.

Exhibits PP-70 and PP-72 depict the property the defendants were required to move from the basement, following the receipt of an email from the plaintiff in May 2015. Exhibit PP-76 depicts the front gate leading to the defendants' apartment and metal poles being used to hold up the staircase. Exhibit PP-84 depicts the door leading to the hallway and the wire from where the thermostat was previously located. Exhibit PP-87 depicts the wire, which was run from "David's apartment." Exhibit PP-90 depicts the set of doors upstairs in the hallway of the subject premises. The defendant did not know why one of

the doors had no handle. Exhibit PP-101 depicts wiring running up the stairs in the subject premises. Exhibits PP-102 and PP-103 depict the floor in the rear bedroom, which has a hole and other damage. Exhibits QQ 1-34 were copies of additional photographs taken by the defendants. Exhibits QQ-4 and QQ-5 depict cracks in the outdoor stairway. Exhibit QQ-28 depicts mold on the floor. Finally, Exhibit QQ-29 depicts a box, which has deteriorated due to mold and moisture.

When asked why she and her family vacated the premises before the expiration of their lease, the J Garratt reiterated her testimony about harassment from Mr. Hetherman after making complaints about mold in the basement and the condition of the stoop, the lack of heat, and the removal of door handles and locks. She additionally noted the fact that the plaintiff had entered their apartment unannounced.

On cross examination, J Garratt testified that Exhibit PP-21 was taken either by her or her husband when they moved into the premises. Exhibit PP-102 was taken shortly after the defendants' moved in, after a floor mat was removed. J Garratt denied that this photo and Exhibit PP-21 were taken in contemplation of litigation.

J Garrat was shown Plaintiff's Exhibit 2, which plaintiff's counsel identified as the lease for the subject premises, entered into by the parties. Counsel read certain paragraphs of the lease into the record.

Paragraph 31 of the lease states:

> Space is as is. Tenant has inspected the apartment and building. Tenant states they are in good order and repair and takes the Apartment as is, except for latent defects.

The last sentence of paragraph 24 of the lease states:

> Tenant gives up any right to bring a counterclaim or set off in any action or proceeding by landlord against tenant on any matter directly related to this lease or apartment.

On further questioning J Garratt acknowledged she had a real estate license. She acknowledged that she worked in a real estate office as a salesperson and explained she had not worked in this capacity prior to moving into the subject apartment.

As to defendant's Exhibit MM, the J Garratt testified that the date on the arrest report was April 30, 2015; and Hetherman was not arrested on that date. She recalled

that on June 26, 2015, she signed an Order of Protection that required her to stay away from the plaintiff.

Exhibit B was identified as an email sent by the witness to the plaintiff, which read "we have been moving into the apartment the last couple of days, and we really like it." The email goes on to state that Hetherman asked the defendant not to call anyone about the boxes in the basement, as he was going to send someone over to take care of that. Exhibits A and C were identified as emails from former tenant Ken Cera. Specifically, Exhibit C depicts Mr. Cera's discussion with Mr. Hetherman regarding the defendants' issues with the smoke alarm and "occasional mice" in the premises. Exhibit E was described as an email from Damon Myers, dated August 7, 2014, detailing his experience interacting with Mr. Hetherman, as a tenant at the premises.

J Garratt testified that she visited the apartment on two occasions prior to moving in. She did not know if the lease explicitly states that the defendants would have access to the basement. Exhibit G was described as an email from Damon Myers, dated August 25, 2014. In one portion of the email, Mr. Myers writes

> The mildew issue was resolved. And you are welcome to use the cellar as is. It is not a finished basement. It is a utility cellar and will always be damp. So, John recommends you not store cardboard boxes down there unless you somehow keep them off the floor, shelving, or the like, that would be installed at your expense. And you must remove when you vacate. The same mildew issue will occur if boxes are stored directly on the floor.

Futher cross examination covered other defense exhibits. Exhibit JJ was described as a floor plan of the building, from an apartment listing; the cellar is not included in the listing. J Garratt testified that this exhibit represented a recent listing for the apartment. She further testified, that initially she was unaware that there was a washer and dryer upstairs in the premises, as she used the one in the basement, which was fully functional. Exhibit J, an text with Hetherman about a reimbursement check for the repair of the metal door was also noted. Exhibits L, M and P were described as text messages regarding access needed underneath the stoop and the need for the defendants to use the upper entrance during the repairs to the stoop and staircase. Exhibit Q was an email from the plaintiff, dated May 18, 2015, wherein he advised that use of the cellar was prohibited. J

Garratt acknowledged defendants never filed a heat complaint with the City; and that they also did not provide written notice to the plaintiff prior to vacating the apartment.

The final witness was defendant R Garratt. He testified that before moving into the apartment, he and his wife visited the premises twice with the realtor. During the walkthroughs prior to moving in, they did not observe a hole in the floor, as it was hidden under a rug; and they did not look in the cabinets, so they were not aware of the mouse problem. After the "mold incident", Hetherman advised them, that they could no longer use the basement area. Hetherman also told them that they could not use the storage closet under the front door to store their items. Further, Hetherman threw some of their belongings in the trash and placed other items on the street.

The defendant described what was for him an unsettling encounter between his youngest daughter (who was 17 years old at the time) and Hetherman. During the reconstruction of the front steps, bricks, cement bags and debris were lying around, leaving only a narrow path to exit the apartment. One morning, as his daughter was attempting to leave, to go to school, Hetherman blocked the path and told the defendants' daughter to walk over the bricks or climb over the sandbags if she wanted to leave. The witness testified that his daughter appeared "traumatized" and came running back inside the house. J Garratt went outside and told Hetherman to move out of the way.

R Garratt testified that after the incident involving the stoop, Hetherman came up to him and made inappropriate sexual threats. There were also additional threats to call R Garratt's employer, while Hesterman constantly "belittled" his employment as a professor. When asked why they did not vacate the apartment after this incident, R Garratt stated, they had nowhere to go.

According to R Garratt, after Hetherman obtained an order of protection against J Garratt, he would constantly announce that he was coming over to the premises and that he was going to be there for a certain number of hours. J Garratt could not be at the premises if there was a chance the plaintiff would show up. Indeed, on one occasion Hetherman announced he was coming to turn on the boiler. When he appeared, he did not know how to turn it on, overfilled it, and had to return the next day with a plumber. On another occasion, Hetherman removed the thermostat from the wall and ran wires upstairs to another apartment. Hetherman then announced that he would need access to their apartment to install smoke detectors (smoke detectors had been requested in the

initial email sent to the plaintiff immediately after moving in). R Garratt offered to show Hetherman that smoke detectors had in fact been purchased by J Garratt, but he refused to look at them. Hetherman then stated he intended to return the next day and, advised that he would be there for four hours. According to R Garratt no repairs were made by Hetherman during these repeated visits.

On yet another occasion, Hetherman "set up shop" right outside their bedroom doors at 7:28 am on a Saturday morning, turned on music and began working on something. Additionally, R Garratt stated that he observed Hetherman removing handles from interior doors in the apartment and drilling the entrance door to the apartment, to the point that it would not function. The lock to the entrance door was drilled out the day J Garratt was arrested. The defendant paid for a locksmith to have the locks changed. R Garrat explained that he got to the point, he feared for his and his family's safety. He and his wife decided to vacate the premises after Hetherman "broke down the door." The defendants rented the first place they could get.

R Garratt was then questioned regarding various video exhibits which were admitted in evidence without objection. Video Exhibit BBB was filmed in October 2015. It depicts Hetherman entering the defendants' premises with a key. He did not knock or ring the bell before using the key to enter. He encountered a chain lock on the door which, according to R Garratt was on the door when the defendants moved in. Hetherman can be heard saying that the chain lock was an illegal lock; and proceeded to remove it from the door. He thereafter removed the latches, and knobs from the closet doors. Later in the video, Hetherman can be seen going into the basement. R Garratt asserted that Hetherman had come to the building because the defendants complained about a lack of heat. After Hetherman went into the basement, R Garratt could hear water running, then heard water spurting out of three radiators in the apartment

On Video Exhibit FFF, R Garratt identified two voices his and the plumber. Later in the video, Hetherman can be heard stating that the thermostat shown in the video was not the original thermostat in the building. Although R Garratt denied installing a new thermostat after moving in, Hetherman can be seen removing the thermostat from the wall. That thermostat was never replaced.

Video Exhibit LLL was filmed on October 23, 2015. According to R Garratt Hetherman had been to the premises Tuesday, Wednesday and Thursday of that week

and stated that he needed to return on Friday, to check the smoke detector. After the defendant asked him to check the smoke detector while he was there, Hetherman refused. It was R Garratt's position that Hetherman never conducted any repairs or work in their apartment, other than taking out the thermostat. Video Exhibit MMM was filmed on the Saturday following the events shown in video LLL. According to R Garratt, Hetherman never advised them that he would be arriving at approximately 7:20 AM to conduct work.

Video Exhibit GGG depicts a metal gate, which locks with a key. It leads into the defendants' apartment. According to R Garrat no one other than his family had a key to this gate. The video shows Hetherman directing one of his workers to remove the items stored under the stoop behind the locked metal gate, and the worker complying. Hetherman could be heard stating that if the items were not wanted, they would be discarded.

In Exhibit HHH, the voices on the video were identified as R Garratt and Hetherman, who can be heard making derogatory comments about the defendant's profession. During a discussion between the two, Hetherman stated that the defendants' apartment does not include the area under the stoop. In Exhibit III, the voices heard are R Garratt and Eddie an employee of Hetherman. Finally, Exhibit NNN, according to R Garratt, was taken as they were vacating the apartment, to show that they were leaving it in "excellent condition."

On cross examination, R. Garratt testified that on the date J Garratt was arrested, when he noticed that the entry door lock was drilled out, he did not see Hetherman at the premises. However, Hetherman returned to the building later that day and retrieved the tools that were left by the door. When asked about defendants' Exhibit BBB, where Hetherman is shown entering the premises with a key, R Garratt denied that Hetherman mentioned anything about a heat complaint before coming to the premises or that Hetherman or someone else was coming to the building to turn on the heat. R Garratt also denied that Hetherman called him prior to his arrival at the apartment. When asked to explain how he knew to have his videotape ready, R Garratt testified that he heard Mr. Hetherman's car, so he was "on the look-out." He also denied that Hetherman knocked and rang the bell before attempting to enter.

Discussion

The Court had the opportunity to observe the witnesses and consider the credible testimony and evidence at trial, as well as the parties' written post-trial summations. The Court found plaintiff testimony to be less than candid and both defendants to be credible. the Court: (1) dismisses the plaintiff's complaint in its entirety; (2) orders that the plaintiff return the defendants' security deposit in the amount of $6,250.00; and (3) awards attorneys fees to the defendants'.

In the absence of any other issues, it is undisputed that the defendants vacated the premises prior to the expiration of the lease term and failed to pay the rent due for October, November and December of 2015 and January and February of 2016. The defendants however, maintain that the conditions within the apartment violated that statutory warranty of habitability. Additionally, the defendants contend that they were harassed; they suffered a partial actual eviction; and were thereafter constructively evicted, therefore relieving them of the obligation to pay rent.

Initially, it should be noted that courts in this state have generally enforced lease provisions precluding tenants from interposing counterclaims (*Titleserve v Zenobio*, 210 AD 3d 310 [2d Dept 1994]. Here, pursuant to paragraph 24 of the subject lease, the defendants are precluded from asserting any counterclaims. The terms of the lease, however, do not prevent the defendants from asserting affirmative defenses in response to any litigation by the plaintiff. Therefore, the affirmative defenses that were also designated as counterclaims within the defendants' answer, will be treated solely as affirmative defenses.

NYC Administrative Code § 27-2004 (a)(48) (i) defines harassment as:

> Any act or omission by or on behalf of an owner that causes or is intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling or unit or to surrender or waive any rights in relation to such occupancy.

The defendants have established, by a preponderance of the credible evidence, that the plaintiff subjected them to harassment during their tenancy. The instances of harassment testified to included but were not limited to Mr. Hetheramn's entering the premises (while

the defendants were home) without advance notice; Hetherman's forcible entry into the premises, which resulted in damage to the door molding and chain lock; Hetherman's removal of the thermostat, leaving exposed wires; Hetherman's intimidating the defendants' teenage daughter; the plaintiff's repeated visits to the premises after obtaining an order or protection against Jada Garratt and the use of vulgar language towards the defendants. The defendants therefore, have established their third affirmative defense. Further, pursuant to NYC Administrative Code § 27-2115(m)(1), a violation of subdivision d of section 27-2005[7] of this code shall be a class c immediately hazardous violation.

Real Property Law § 235-b (1)[8] states in part:

> In every written or oral lease or rental agreement for residential premises, the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents 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 life, health or safety.

"The warranty of habitability was not legislatively engrafted into residential leases for the purpose of rendering landlords absolute insurers of services which do not affect habitability" (*Park West Management Corp v Mitchell*, 47 NY 2d 315, 327 [1979]). A landlord is not required to ensure that the premises are in perfect condition, but does warrant that there are no conditions present that materially affect the health and safety of the tenants (*Id*, at 328); *Solow v Wellner,* 86 NY2d 582, 588 [1995]).

The defendants have established, by a preponderance of the credible evidence, that the plaintiff breached the warranty of habitability with respect to the subject premises and that their health and safety were detrimentally affected by the presence of mice and/or rats in the premises during their tenancy. Hetherman acknowledged that he was aware of the defendants complaints and suggested, among other things, that the defendants place a cover on their garbage pail, so as not to attract mice. The defendants

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[7] The owner of a dwelling shall not harass any tenants or persons lawfully entitled to occupancy of such dwelling as set forth in paragraph 48 of subdivision a of section 27-2004 of this chapter.
[8] The Warranty of Habitability

therefore, have established their fourth affirmative defense of breach of the warranty of habitability.

"An actual eviction occurs when a landlord wrongfully ousts a tenant from physical possession of the leased premises" (*Marchese v Great Neck Terrace Assoc.*, 138 AD3d 698, 699-700 [2d Dept 2016]). Where a tenant is removed from a portion of the demised premises, the eviction is actual, even if only partial (*Barash v Pennsylvania Terminal,* 26 NY 2d 77, 83 [1970]). An appropriate remedy to a partial eviction by the landlord is the withholding of rent (*Eastside Exhibition Corp v East 86th Street Corp,* 18 NY3d 617, 622 [2012]).

The defendants have established, by a preponderance of the credible evidence, including the videographic evidence that the plaintiff partially evicted them from a portion of the demised premises. The defendants have established that the premises were marketed as including use of the basement for storage and an available laundry. Further, the defendants have established that upon moving into the premises, they utilized the basement for storage and used the laundry facilities located in the basement. Additionally, the plaintiff advised that defendants, through an intermediary, not to place personal items directly on the floor of the basement, as same tended to stay wet. It was only after the defendants' complaints regarding mold in the basement and the condition of the outside steps did the plaintiff advise that they were not to store any items in the basement or under the stoop, and that anything left there by them would be discarded. Defendants therefore have established their fifth affirmative defense of partial actual eviction.

"To be an eviction, constructive or actual, there must be a wrongful act by the landlord which deprives the tenant of the beneficial enjoyment or actual possession of the demised premises" (*Barash v Pennsylvania Terminal Real Estate,* 26 NY2d at 82). Constructive eviction occurs when the wrongful acts of the landlord substantially and materially deprive a tenant of the beneficial use and enjoyment of the premises (*Joylaine Realty v Samuel*, 100 AD3d 706, 707 [2d Dept 2012]). The tenant must abandon possession of the premises in order to claim that there was a constructive eviction (*Barash*, 26 NY 2d at 83).

The defendants have established, by a preponderance of the credible evidence, including the videographic evidence that the plaintiff constructively evicted them from

the subject premises, in light of the harassment, partial eviction and conditions present within the subject premises. To establish a breach of the covenant of quiet enjoyment, a tenant must establish that there was either an actual or constructive eviction (*Grammer v Turits*, 271 AD2d 644, 645 [2d Dept 2000]). Based upon the foregoing, the defendants have established, by a preponderance of the credible evidence that the plaintiff breached the covenant of quiet enjoyment.

As the defendants have established that the plaintiff breached the warranty of habitability; breached the warranty of quiet enjoyment; harassed the defendants and their children; partially evicted the defendants and constructively evicted the defendants, the plaintiff is not entitled to collect the claimed unpaid rental amounts (See *Eastside*, 18 NY3d at 622). Therefore, the plaintiff's first and second causes of action are dismissed.

As to the third cause of action, the complaint alleges that the plaintiff expended $36,355.00 "to put the premises in good repair and prepare it for renting." However, the testimony adduced at trial reveals that the plaintiff spent only $2,350 to make repairs to the floor of the rear room. The plaintiff has not established, by a preponderance of the credible evidence, that the necessary repairs were caused by the actions of the defendants. Hetherman testified that he did not inspect the apartment after the prior tenant vacated. Additionally, the defendants have established by a preponderance of credible evidence, including testimony and photographs that the floors of the rear room were in poor condition when they took possession of the apartment. Therefore, the plaintiff's third cause of action is dismissed.

Real Property Law § 234 (1) states in part:

> Whenever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys' fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease, or that amounts paid by the landlord therefor shall be paid by the tenant as additional rent, there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease or in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease.

The plaintiff's right to attorneys' fees is set forth in paragraph 23 (D)3 of the subject lease, [9] which states in part:

> If this lease is canceled, or Landlord takes back the apartment, the following takes place:
>
> > Any rent received by Landlord for the re-renting shall be used first to pay Landlord's expenses and second to pay any amounts Tenant owes under this Lease. Landlord's expenses include the costs of getting possession and re-renting the Apartment, including, but not only reasonable legal fees, brokers fees, cleaning and repairing costs, decorating costs and advertising costs.

"Where a lease so provides, the court must interpret the lease to similarly permit the tenant to seek fees incurred as a result of the landlord's breach or the tenant's successful defense of a proceeding by the landlord" (*Graham Court Owners Corp v Taylor*, 24 NY3d 742 [2015]). As the prevailing party herein, the defendants are entitled to reimbursement of attorneys fees. Accordingly, it is

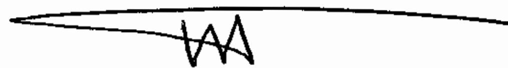
ORDERED, that the court issues a verdict in favor of the defendants, Rodney Garratt and Jada Garratt, dismissing the plaintiff's complaint is in its entirety; and it is further

ORDERED, that within 30 days of service of this order with notice of entry, the plaintiff shall pay to the defendants the sum of $6,250.00, representing the return of their security deposit; and it is further

ORDERED, that a hearing shall be held before a referee, to hear and report the amount of attorneys' fees due to the defendants.

The following constitutes the decision, and order of the Court.

E N T E R



J. S. C

HON. WAVNY TOUSSAINT
J. S. C.

[9] Plaintiff's Exhibit 2