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Bard v. Glick

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Bard v Glick
2022 NY Slip Op 50025(U)
Decided on January 19, 2022
Civil Court Of The City Of New York, New York County
Stoller, J.
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This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on January 19, 2022

Civil Court of the City of New York, New York County

<p>Steven Bard, Petitioner,</p> <p>against</p> <p>Jason Glick, MAUTNER-GLICK CORP., Respondents, and THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT Co-Respondent</p>

Index No. L & T 2266/2016

For Petitioner: Brandy Beltas

For Respondent: Martin Meltzer and Joshua Zukofsky

Jack Stoller, J.

Steven Bard, the petitioner in this proceeding ("Petitioner"), commenced this proceeding pursuant to New York City Civil Court Act §110(c) against Jason Glick and Mautner-Glick Corp. ("Respondents") and the Department of Housing Preservation and Development of the City of New York ("HPD"), seeking an order directing Respondents to correct violations of the New York City Housing Maintenance Code at 28 King Street, Apt. 24, New York, New

York ("the subject premises"). This matter previously settled. Respondents now move to dismiss the case based on their claim that they complied with the settlement. By an order dated October 9, 2018, ("the Order") the Court granted Respondents' motion to the extent of setting the motion for a hearing. The Court held the hearing on Respondents' motion on September 4, 2019, October 3, 2019, December 20, 2019, January 17, 2020, January 30, 2020, February 14, 2020, August 2, 2021, August 19, 2021, October 15, 2021, and November 15, 2021 and adjourned the matter to January 4, 2022 for post-trial submissions.

Background

Petitioner testified that he has been a tenant of the subject premises for thirty-five years; that he started this proceeding in 2016 because there was chronic water intrusion; that there were high humidity levels; that the parapet was faulty such that water could intrude; that there was damaged plaster in all three rooms of the subject premises; that there were water-damaged [*2] window frames in the kitchen and bathroom; that there was microbial growth on walls; that the indoor air quality was terrible; that he tried to have Respondents remedy these problems before starting this proceeding; and that Respondents responded by telling him that Lawrence Env. LLC ("the Mold Assessor") needed to do a survey.

Respondents submitted into evidence a mold moisture intrusion survey done by the Mold Assessor of the subject premises dated September 17, 2016 ("the Mold Assessor's First Report"). The Mold Assessor's First Report showed, *inter alia*, that there was water intrusion and water-damaged surfaces in the bedroom and bathroom walls; that surface samples for mold showed that there were mold spores on all of the samples; that there was only one sample from the bathroom ceiling that showed light levels of mold growth, defined as potential growth; that a structural engineer must assess the roof and exterior brick walls for damage; and that mold should be removed in accordance with the New York City Department of Health and Mental Hygiene ("DOHMH") Guidelines on Assessment and Remediation of Fungi in Indoor Environments, Medium Projects ("the DOHMH Guidelines").

By an inspection done on September 25, 2016, HPD placed violations of the Housing Maintenance Code on the subject premises. As is particularly relevant to this matter, HPD placed violation No.11407133, which directed that Respondents trace and repair the source and abate the nuisance consisting of approximately five square feet of mold at a north wall in the bathroom ("the HPD Violation"). [EN1](#) Petitioner then commenced this matter.

The Stipulation

The parties settled this matter by a stipulation dated May 9, 2017 ("the Stipulation"). The Stipulation obligated Respondents to correct the HPD Violation; to remediate mold conditions that Petitioner had raised in a filing for a rent reduction order pursuant to 9 N.Y.C.R.R. §2523.4 with the New York State Division of Housing and Community Renewal ("DHCR"), to wit, "toxic mold" and water damage in the kitchen, bedroom, and bathroom walls and ceiling; and to "[r]emediate the mold conditions in [the subject premises] so as to meet standards for testing implemented by [the Mold Assessor]" on or before June 30, 2017. The Stipulation further stated that "Respondents shall perform the Remediation Work of professional standard [sic]." The Stipulation required Respondents to first remediate the exterior of the building in which the subject premises is located ("the Building"), including brick replacement and removal of drywall and plaster in the rear and west exterior walls, work which the Stipulation characterized as "Phase 1," and then remediate conditions in the subject premises, which the Stipulation characterized as "Phase 2." The Stipulation obligated Respondents to pay for Petitioner's stay in a hotel and for the storage of Petitioner's personal property at a storage facility during the Phase 2 work. The Stipulation provided that upon professional completion of the remediation work, Respondents would give Petitioner notice that Petitioner should reoccupy the subject premises. Upon professional completion of the remediation work, the Stipulation obligated Petitioner to discontinue this proceeding against Respondents with prejudice and withdraw the DHCR complaint.

[*3] Respondents' Actions Regarding Remediation

The parties stipulated that Tom Eng ("Respondents' Mold Expert") was qualified as an expert in mold. Respondents' Mold Expert testified on direct examination that he works for the Mold Assessor; that he is a principal industrial hygienist; that he leads a group of hygienists and scientists; that he evaluates exposure to mold; and that he had joined the Mold Assessor in November of 2016.

Respondents' Mold Expert testified on cross-examination that he was a chemical engineer; that he oversees a staff of four who perform various industrial hygiene surveys from indoor air quality, mold surveys, and a whole variety of occupational hazards; that he is also a New York State-licensed mold assessor; that mold assessment is 90% of his practice;

that he was trained in industrial hygiene; that he was certified by the American Board of Industrial Hygiene in 1981; that he personally performed well over 100 mold assessments, meaning he was on site, did the surveys and wrote reports; that of those assessment, less than five were for Respondents; that between ten and twenty of those surveys were for tenants; and that he does not write a report without visiting the premises.

Respondents' Mold Expert testified that mold spores are universal and normal; that what must be remediated is mold growth, which typically is a condition involving wet and/or water-damaged surfaces, where spores can land and grow, and a nutrient source; that typically a nutrient source would be material that is organic in nature, such as gypsum board or cellulose; that plaster and brick lack organic matter, so even if plaster gets wet, plaster cannot support mold growth; that the Mold Assessor follows the DOHMH Guidelines for investigating fungi in an indoor environment; that the Mold Assessor recommends visual inspections, followed up with moisture meters to identify wet surfaces and boundaries, and they will at times when necessary collect surface samples to confirm whether or not staining that they observe is mold growth; that sometimes a substrate can be wet, but you may not see the staining, so they will use a moisture meter and they will go across that surface until they get to the lines where it is dry; that a moisture meter is measured in relative percentages, comparing everything to wood moisture; that if there are samples that confirm no mold growth, depending on the substrate they would recommend drying the surface; and that they make sure that containment is established, that there is HEPA filtration, and that all of a work area is then done under a controlled environment.

Respondents' Mold Expert testified that the combination of the work in the bedroom and bathroom would amount to an estimated total of 10 to 100 square feet, which the DOHMH Guidelines define as a medium-sized project; that the Mold Assessor recommended that certain surfaces be removed, such as a bathroom ceiling; that they recommended that other surfaces, such as wet walls in bedroom, be scarified (meaning to scrape off the top layer) so they would dry faster, as usually that is what traps in moisture, and opening up the porous surfaces to allow the water to move; that dehumidifiers would be used also; that having a professionally-trained company do the work was all part of that recommendation; that once work is completed by a licensed mold contractor, the Mold Assessor will do a post-wall survey which will check the contractor's work to see if all areas where they recommended removal and drying have been performed; and that "clearance criteria" means that they see if areas are free and clear of visible mold, surfaces are dry, and if all debris has been dried and removed.

The Court granted Respondents' application to qualify Thomas Capobianco ("the Engineer") as an expert in engineering and façade work. The Engineer testified that his [*4] responsibilities were to work on construction and bidding documents for restoration work at the building in which the subject premises is located ("the Building"); that he was involved in April and May 2017; that he went to the subject premises; that a field report was issued for an exterior project in 2017; that, upon putting that out for bid, he reviewed work done being done by to verify conformance with industry standards; that after they did work together on the bid documents and the filing documents, there were on-site inspections of scaffolding and a meeting with the contractor; and that his direct role was to review notes, photos, and a field report before they were sent to management. Respondents submitted into evidence a sign-off from the New York City Department of Buildings ("DOB") dated April 4, 2017, to repair and replace the south and west facade elevations as necessary to include pointing and masonry and replace steel angles, sills, and caulking of windows as per plans, with the work by hanging scaffold, and the shed under separate application. Respondents also submitted a field report, dated May 5, 2017, into evidence. The Engineer testified that the demolition of the designated areas of the fifth floor of the Building was completed, the wall was "parged" [sic.], meaning cement was applied to a masonry wall to seal openings and create a smooth surface, that a waterproof membrane was installed, and the brickwork was installed; that the work was completed in accordance with contract documents and industry standards; and that DOB issued a letter of completion. Respondents submitted into evidence records from DOB saying that permits were closed and the work related to the application for the permit was completed, which the architect certified on December 14, 2017.

The Engineer testified on cross-examination that the need for exterior work was discussed with him in 2016 and that Respondents asked for work on the facade of the Building, specific and general. Petitioner submitted into evidence an invoice from the Engineer's company to Respondent for filings for the subject premises, with a check from Respondent. The Engineer testified on cross-examination that the project was for four buildings encompassing the Building, not just the Building; that he had earlier consultations with Respondent before this job in 2006; that the work was in isolated areas identified in bid documents filed with DOB, primarily the south elevation and certain areas of the courtyards; that he inspected the roof; that he did not review mold reports; that he did not provide recommendations for a contractor; that Respondents have a bid list that they work from; that there could have been coating added to brick; and that there could not have been more extensive work without going to apartments, which he would not have recommended. The Engineer testified on redirect examination that it was not necessary to work in the interior

and would be extremely intrusive to do so and that superficial work is not as long-lasting as work that he recommended.

Tassawar Ahsan ("the Contractor") testified that he is the vice-president and project manager for Aptech Contracting Corporation, which does exterior restorations and roofing work; that he supervises projects and does bidding; that he has personally been with the company for 19 years; that he also previously worked in that field; and that he is licensed. Respondents introduced into evidence the Contractor's general contractor license and a special rigger's license issued by DOB. The Contractor testified that a construction superintendent license that was in effect for him in 2017 authorized him to work on buildings above ten stories. The Contractor testified that he knows the subject premises and the Building; that his company was hired to do brick replacement work on the south and west elevations on fifth floor; and that he had to get a permit. Respondents submitted into evidence the DOB permit to repair and replace the south and west facade elevations as necessary, to include pointing, masonry, replacement of steel [*5]angles and sills, and the caulking of windows as per plans.

The Contractor testified that plans had been written already; that he oversaw the scope of the work done in the permit; that he started the work on April 11, 2017; that he completed the work on May 25, 2017; that they staged and insulated the roof; that they then installed rigging, meaning hanging a suspended scaffolding system; that they then did demolition; that they replaced face bricks from the top of fourth-floor window lintel to the parapet level, which took approximately five to six days; that they then called the Engineer, who was required to check the back-up masonry wall for deficiencies; that most of the back-up masonry was in good shape; that there were a few gaps; that the Engineer said to fill those voids; that there was a gap between the mortar and the brick; that it was filled with mortar; that after that, the next step was to install the vapor barrier system, which is a waterproofing membrane; that they applied a primer that would adhere membrane to the bricks; that they used four-foot-wide rolls; that they started from a lower point to the top, in four-foot sections; that the membrane was put over every place where the demolition had been done; that that took two to three days; that that was completed and approved by the Engineer; that the next step was to install bricks again; that the brickwork took roughly three weeks; that there was nothing else in this permit; that they used new bricks and mortar; that the Engineer was called after brickwork was done; that the Engineer signed off on brickwork; and that after that it was perfect.

The Contractor testified on cross-examination that Respondents hired him; that

Respondents called him one to two months before they started; that Respondents did not say why they wanted work to be done, but just showed him drawings which were done by civil engineers he worked with before; that he was not there every day, but once a week or if someone on his crew needed him; that the project took month and a half; that he did work for Respondents before; that the exterior restoration was from the top of fourth floor up to bottom of parapet on the fifth floor; and that the bricks they took off before installing the membrane were porous.

Respondents introduced into evidence a letter dated May 11, 2017 from Respondents' counsel to Petitioner stating that Petitioner can go to a hotel. Petitioner testified that he received a notice to vacate pursuant to the Stipulation and that he left the subject premises for the hotel on May 15, 2017.

Mohammed Safi ("the Project Manager") testified that he works for American Fire Restoration, which engages in mold remediation; that he oversees jobs, estimates jobs, and makes sure that jobs go from point to point completion; and that he is licensed in water remediation, mold remediation, drying, and fire cleanup. Respondents submitted into evidence the Project Manager's water damage restoration license, which expired on October 31, 2019. The Project Manager testified that the license was in effect when the remediation of the subject premises occurred, in 2017. Respondents submitted into evidence a certification from an entity called the Institute for Inspection Cleaning Restoration showing that the Project Manager is a registrant in good standing in water damage restoration, applied structural drying, and odor control; a certification from the Restoration Industry Association showing that the Project Manager is a certified mold professional; and a license dated 2016 from the New York State Department of Labor showing that the Project Manager is a mold abatement worker. The Project Manager testified that the certification memorializes that he understands how water intrusion occurs and how to identify materials and the drying process and that he can perform mold remediation.

The Project Manager testified that he personally came the subject premises; that he got [*6] the Mold Assessor's First Report; that in general he understood what it said; that water intrusion in the subject premises extended from the bathroom to the living room and also noted that mold remediation was required in the bathroom/kitchen area and studio area and selected demolition was required in the bathroom and the studio; that when one enters the subject premises, one walks into a kitchen area; that the studio is fifteen feet away; that to the back on the right is a bathroom; that the subject premises has four to five hundred square feet; and that he had not seen the Stipulation.

The Project Manager testified that he was present in the subject premises for two days to remove wet damaged materials in bathroom and then clean, i.e. perform mold remediation; that on the first day he and the crew isolated rooms from one another to prevent cross-contamination; that they then applied six-millimeter plastic sheathing on doorways; that they installed HEPA air filtration areas in the bathroom, kitchen, and studio; that they placed protections around appliances, floors, and radiators; that they did not want dust or mold spores on the radiators; that they wrapped up appliances; that mold remediation has three phases, testing, cleaning, and post-testing; that after the protection was completed, the crew chief and he walked through areas where they had to do selected demolition and took protections to avoid damage; that they removed one wall rather than all four walls, depending on what the Mold Assessor's First Report required; that they used selective demolition in an exterior wall of the bathroom and an exterior wall of the studio and bedroom; that there was no selective demolition in kitchen; that they remove plaster down to masonry; that they inspected visually to see if additional work was required beyond report; that they then removed mold; that they then were done with what the Mold Assessor recommended; that he did not remember the size of the plaster that he demolished; that they would have to go 18 inches beyond what the Mold Assessor recommended as per standard guidelines, the purpose of which is to assure that mold is gone; that additional plaster did not have to be removed after the demolition; that then there was a detailed cleaning of the ceilings, walls, and floors with a HEPA vacuum; that they then wiped it down and HEPA-vacuumed again; that they also installed two HEPA air filtration devices; that they collected mold dust in air; that the guideline requires that the HEPA air filtration devices remain in operation from one to two days after the work is completed; that they then called the Mold Assessor for what is called a clearance test; that the clearance test did not require another remediation; that he returned to the subject premises to get his equipment; that maybe three people on his team are licensed; that he is familiar with DOHMH Guidelines for mold remediation; and that he followed the DOHMH Guidelines.

The Project Manager testified on cross-examination that he has done a range of other work for Respondents; that he was limited to what the Mold Assessor prescribed; that he met Petitioner during the inspection; that he did not tell Petitioner that Petitioner had to relocate; that there had been water intrusion; that he told one of the Respondents that there was no water intrusion; that there was no water intrusion a prior time that he did work; that there was an estimate he made for cost; that he did not know how long from his first time that the remediation started; that the HEPA air filtration device and the dehumidifier were turned off 24 hours prior to testing; that he does not open windows after remediation to air an apartment

out; and that the time it takes plaster walls to dry depends on extent of water damage.

Petitioner submitted into evidence the following emails: one dated May 23, 2017 between the Project Manager and Respondents, stating that the Project Manager would coordinate with the super of the Building to remove equipment; one dated June 15, 2017 from [*7] Respondents to the Project Manager stating that DHCR inspected, that it was unlikely that plaster has dried out, that DHCR found moisture in one of the newly plastered wall surfaces, and that the Project Manager should bring dryers and dehumidifiers; one dated June 21, 2017 where the Project Manager tells Respondents that a majority of wall is dry with the exception of a few wet spots; one dated June 21, 2017 from Respondents to the Project Manager where Respondents say to run the machines for two more days; one dated June 23, 2017 from the Project Manager to Respondents that there were spotty wet readings and that the equipment has been repositioned; and one dated June 26, 2017 from the Project Manager to Respondents saying that it is dry now. The Project Manager testified on cross-examination that he thought that the walls were dry but then he found walls were still wet; that he uses a two-part moisture meter to measure that; that the wipes have antimicrobial solution; that they HEPA-vacuum, use the wipes, then HEPA-vacuum again; that the demolition took one day and the cleaning afterward took two to three days total; and that he did not find mold aside from the scope of the work or water intrusion.

The Project Manager testified on redirect examination that he was in the subject premises on May 16 and May 17 of 2017; that he did not know why the subject premises was damp after his work; that after May of 2017 water intrusion could have come from outside pointing work; and that an industry standard is that one turns off the HEPA filtration machine and a dehumidifer before testing.

Lawrence Axiak, the owner of a construction company ("the Construction Company Owner") testified that Respondents hired him to do some work at the Building; that he had to skim-coat west walls and the bathroom and bedroom walls; that skim-coating is a mold-resistant plaster; that he had to prime and paint the two walls with special mold-resistant low-volatility paint to protect it from mildew; that he had to rebuild the west wall; that he used plaster on west wall, the living room wall, and base molding; that he built marble around the window and the kitchen; that in the bathroom he laid ceramic tile all around the toilet and the west wall from floor to ceiling; that he installed wonderboard, a cement board before tile, in the bathroom; that wonderboard is installed with special plaster and nails; that this went on the west wall around the window; that he installed ceramic tile and grout; that he glued tile on the wonderboard; that after the tiles are grouted, you just have to clean them with a rag

and a sponge; that he painted the bathroom and the kitchen cabinets; that he removed an old broken cabinet and installed a new one; that in the living room, he painted the base molding and cleaned material and dust; that he vacuumed and mopped it a couple of times; and that when he finished the work, there were no holes in the ceiling or the walls. Respondents submitted into evidence his invoice to Respondents dated June 12, 2017 for \$9,600.00, for supplies, applying five coats, supplying and installing new mold-resistant board on the bathroom ceiling, new ceramic tiles, new mold resistant grout, new marble framing, two new cabinets in kitchen, and new base molding, and painting the entire subject premises. The Construction Company Owner testified that the job started about May 20 and took two weeks and that work was done in a professional manner.

The Construction Company Owner testified on cross-examination that one of Respondents had contacted him around May 15 and did not ask for an estimate; that he toured the subject premises with one of Respondents before starting the work; that he has worked many jobs for Respondents before, for 25 years; that he is an independent contractor; that he does not have any licenses; that he and two helpers performed the work; that his helpers are not licensed; that he used a mask with filters and gloves when he did work; that he did not do any demolition; [*8]that only he and his crew worked in the subject premises while he was there; that he only does painting and drywall, not demolition; that the subject premises looked good when he saw it; that the only problem was that the west wall did not have plaster; that the entire west wall and ceilings of entire subject premises, in the bedroom, the living room, the bathroom, and the kitchen looked good; that when you do tiling, you do a little bit of work on the ceiling; and that he put plaster in the ceiling to fill out opening between a new wall and a ceiling.

The Construction Company Owner testified on redirect examination that no permit was required for his work and that he observed no active water when he was there.

The Mold Assessors' Post-Remediation Work

Petitioner testified that Respondents called him on the afternoon of May 23, 2017 and informed him that the Mold Assessor had inspected the subject premises and found it to be mold-free.

Respondents submitted into evidence a survey issued on May 31, 2017, shortly after the Stipulation was entered into ("the Mold Assessor's Second Report"). With regard to the

bedroom, the Mold Assessor's Second Report found no signs visible mold growth; that the west wall had been removed from floor to ceiling; that there was no visible mold growth on exposed brick or on a south wall; and that moisture meter readings were all dry and debris that was created during remediation work was removed. With regard to the living room, the Mold Assessor's Second Report found no signs of water intrusion or mold growth; a moisture meter showed accessible surfaces were dry; and all debris that was generated was removed. With regard to the bathroom, the Mold Assessor's Second Report found no active water intrusion or visible mold growth; that a section had been removed from the ceiling about 5 feet east from the west wall; that an anti-fungal encapsulant was employed, when wood had been cleaned, on exposed wood joists and a subfloor above; that sections of north and west walls were removed and there was no visible mold growth or staining on the brick of either wall; that moisture readings in showed dry accessible surfaces; and that debris was removed as well. The Mold Assessor's Second Report concluded that the remediation work plan that was provided in an initial assessment had been followed; that all of the work was performed effectively and in a satisfactory matter; that restoration and reconstruction could proceed; that the work was done professionally, within guidelines established by the City of New York; and that all areas of concern have been addressed in a satisfactory manner, with no further recommendations.

Respondents' Mold Expert's Work

Respondents' Mold Expert testified on direct examination that he personally conducted a survey of the subject premises in 2017 after the remediation; that he had a junior assessor with him; that the survey was a post-restoration clearance survey, which is not standard; that he was in the subject premises; that as of June 2017, the time of the survey, many walls and ceilings had been restored; that when you apply new plaster it takes time to harden, which is why it was wet; that the wetness did not indicate a source of water; that lab results from three samples in the bathroom and two samples in the bedroom showed that there was rare growth, meaning that mold growth was not likely; that one sample from the bathroom ceiling had light mold growth; that there was no other finding of mold spores or growth in the subject premises; that there was [*9] water damage on the west wall of the bathroom extending two feet below the ceiling and three feet south of the north wall; and that they observed physical damage in kitchen/office area.

Respondents' Mold Expert testified on cross-examination that the person who actually did the survey for the Mold Assessor does not have the license, although the company holds

a license; that he was in the subject premises for 45 minutes to one hour; that he performed moisture readings; that he did not collect dust for cultural analysis; that mold spores were found; that this spore typically causes allergies; that he only collected one sample from the walls; that the kitchen window framing was not tested for mold because he was not aware of any HPD report to that effect; and that when he performs a survey, he does a visual inspection, and if there is no visible sign of mold growth and surfaces are dry, they do not collect a sample.

Respondents' Mold Expert testified on redirect examination that the Mold Assessor follows protocols of DOHMH; that testing was done in accordance with industry standards; that New York State guidelines were followed; that the testing met standards set by the Mold Assessor; and that the remediation was done professionally.

Respondents submitted into evidence a survey dated July 6, 2017 ("the Mold Assessor's Third Report"). With regard to the bedroom, the Mold Assessor's Third Report found no signs of active water intrusion or visible mold growth, that the west wall had been restored with a new plaster finish and painted, that the south wall has been restored with new plaster, that moisture meter testing found acceptable all other accessible surfaces, that they collected a surface sample and found an asco spore, i.e., a spore associated with soil and plant matter mostly found outdoors and typically brought in if windows or doors are opened and if it is brought in on clothing and which is not indicative of mold growth, no debris, that a surface sample from the walls showed no mold growth, that surfaces were dry and the restoration was complete, and that the work passed clearance criteria for remediation work.

Respondents submitted into evidence a letter dated June 16, 2017 from Respondents' counsel to Petitioner's counsel saying that Respondent can reoccupy the subject premises. Respondents introduced into evidence an order from DHCR dated September 24, 2018 ("the DHCR Order") stating that DHCR inspected the subject premises on February 20, 2018 and May 11, 2018 and found no evidence of moisture, wetness, or leaks in kitchen, bathroom, or bedroom and no evidence of peeling paint, bubbling paint, or leaks to the ceiling throughout the subject premises. The DHCR Order restored the rent to the level that had been in effect and referred Petitioner to DOHMH regarding mold. Respondents introduced into evidence documentation that HPD dismissed the HPD Violation following an inspection on October 10, 2017.

Petitioner's Post-Remediation Experience and Action

Petitioner testified that he received a survey from the Mold Assessor six weeks after it was done, through his attorney; that he asked Respondents if the Mold Assessor had tested the subject premises; that Respondents said they did not know; that he was confused about how they got results so quickly; that Respondents did not know whether they tested or how they knew there was mold in the subject premises; that Respondents said that they did not open the kitchen wall; that Respondents said that Petitioner could speak to Respondent's Mold Expert; that Respondents set up a conference call on May 26 with him, Sergei Moody ("the Mold Assessor's Associate"), and Respondent's Mold Expert; that he went into the subject premises for an overnight test; that the first time he had gone into the subject premises after May 23, 2017 was [*10]that evening; that there was no plastic sheeting or a sticky pad; that there was a large brown bulbous thing on the wall above the toilet; that there was an open cavity into the kitchen roof rafters area; that the air was moldy; that he was symptomatic to it; that there was growth in the rafters; that he wanted to have the subject premises tested himself; that he had not received the survey at that point; that the Mold Assessor wanted to reduce the scope of work; that the Mold Assessor thought that the kitchen ceiling did not need to be remediated; that Respondents would be managing the project; that Respondents had contacted him and asked him not to open the kitchen ceiling; that he understood that Respondents were saying that the problems were fixed as of that point; that Respondents said that things had not been remediated, i.e., the kitchen window framing and bathroom framing, and that the Project Manager's company would not do that, but that Respondents' own employees would do it; that he then contacted HPD after May 26, 2017 and asked for a new inspection; that HPD and DHCR then inspected; that an HPD inspector came to the subject premises sometime in June; and that Respondents tore out kitchen and bathroom window framing.

Petitioner submitted into evidence photographs dated in June of 2017 of a frame on a window taken out during the process of the work. Petitioner testified that there had been wood there prior to that with water damage in it; that the wood framing was removed; that Respondents said that Respondents' in-house crew did demolition work; that he did not witness who took off the framing; that at a later date he saw workers there doing some work; that one worker was painting and another was wiping walls with a giant sponge in dirty water; that he saw a water-damaged bit of wall to the right of the window that has not been investigated; that he saw plaster that looked abnormal; that this was where he complained about water intrusion; and that he notified Respondent in writing about his concerns.

Petitioner submitted into evidence a letter dated June 13, 2017 from Respondents to

Petitioner saying that Petitioner should reoccupy the subject premises as of June 16, 2017. Petitioner testified that he replied to the letter, alleging that demolition released contaminants and other problems persisted. Another letter in evidence from Respondents' counsel dated June 16, 2017 said that Petitioner could return to the subject premises on June 21, 2017, because the work was still drying and that Respondents would not pay for Petitioner's hotel after June 20, 2017. Petitioner testified that he continued to stay at the hotel after getting this notice; that he went to the subject premises; that he opened the windows that afternoon; that he attempted to stay overnight; that within forty minutes he was physically unable to remain in the subject premises and he had to return to the hotel; that he had impaired breathing, facial flushing, and the start of a sinus headache; that when he left the subject premises he gradually felt better after three or four hours; that he notified his attorney, Respondents, and Respondents' counsel by a joint email; and that Respondent withdrew the reoccupancy notice.

Petitioner submitted into evidence a letter dated June 21, 2017 from Respondents' counsel, withdrawing the reoccupancy notice. Petitioner submitted into evidence another letter dated June 30, 2017 from Respondents' counsel saying that the subject premises would be ready on July 3, 2017 and that Respondents will not pay for hotel costs after July 3, 2017. Petitioner testified that then he went to the subject premises to sleep over and had an allergic reaction comprising of breathing difficulties, sneezing, agitation, headache, and facial flushing; that he left the subject premises; that he was at the subject premises for under an hour, that after he left the subject premises he took the train to the hotel and took a hot hour-long detox bath, which calmed his allergic symptoms, and he took other things that calmed his responses so that he [*11] could sleep, all of which took him about three or four hours; that the day of Respondents' Mold Expert's testimony was when he learned of the Mold Assessor's survey of the subject premises; that Respondents' Mold Expert did not question him in the course of their survey; and that he left the hotel on or about July 16, 2017.

Petitioner testified on cross-examination that that he said that he could not appear in Court because of the air quality in the Courthouse; that he insisted on appearing in Court by telephone; that since May 9, 2017 he was in the subject premises once or twice every time he visited New York; that he caused eight probe holes, two inches in diameter, to be placed in the ceiling of the subject premises; that he was present when the holes were made; that in September of 2017 someone named Fiore Deros ("Petitioner's Friend") made those holes in the ceiling; that Petitioner's Friend worked for a building maintenance person; that Petitioner's Friend is a neighborhood friend and a filmmaker; that Petitioner's Friend did not use a negative pressure machine; that Petitioner's Friend used a drill and Petitioner had a bit

that was two inches in diameter; that Petitioner's Friend penetrated the width of the ceiling material; that after the drilling he was able to see into the ceiling cavity except for one of the holes which was blocked; and that he is now in Augusta, Maine.

Background regarding Petitioner's Mold Expert

Petitioner testified that he asked Edward Olmsted ("Petitioner's Mold Expert") to inspect for mold on October 12, 2017 and that Petitioner's Mold Expert asked him questions. The parties stipulated that Petitioner's Mold Expert was qualified as an expert in mold. Petitioner's Mold Expert testified he works as a consultant in industrial hygiene doing health and safety surveys, mostly in New York City; that he has been trained in microscopy; that he is a certified industrial hygienist; that there are various guidelines published by American Industrial Hygiene Association ("AIHA"), a professional association of hygienists, DOHMH, and the Institute for Cleaning Restoration for doing a mold abatement project; that they require that a mold assessor prepare a mold abatement plan and they specify what they want in the work plan; that AIHA provides reference materials and publishes different guidelines or texts which are reference materials for mold; that two of the more important ones are the "green book" about mold assessment and remediation and another material with different text but covering the same content; that the practice is to do a site survey; that a site survey involves interviewing the person that is having symptoms or observing water damage or mold growth or a history at that location; that there should be a visual inspection of the complaint area for contaminants or evidence of water damage; that after that a diagram is created; that one then takes moisture readings to see where it is testing damp and where there are active leaks; that a strategy can then be developed to see whether there is a mold problem and the scope of that problem; that the survey would involve taking samples in order to assess what the scope might be to see what has to be done to eliminate the mold problem; that after the samples are taken, they are typically shipped to an AIHA-accredited lab that specializes in environmental mold with a sample data sheet explaining where it came from; that it could take ten to twelve days to complete the analysis and then they complete the lab report; that the assessor gets the lab report results; and that based on the results, an abatement work plan is developed to mitigate the mold problem.

Petitioner's First Report

The Court received into evidence a report dated November 13, 2017 ("Petitioner's First Report") made by Petitioner's Mold Expert of a survey done on October 12, 2017. Petitioner's Mold Expert testified that Petitioner's First Report, which he prepared, entailed a lot of

analysis of samples that Petitioner's Mold Expert collected; that Petitioner's Mold Expert did an analysis of air samples and the tape-lift samples; that when he sends samples out, he is always sure to select a lab that is accredited in microbial analysis; that a lot of work had already been done; that the mold abatement had been determined complete; that the ceiling is a plaster ceiling that is a foot or so below the roof deck of the Building; that there is an asphalt roof with a wood plank that is nailed across joists that make the actual roof; that one could walk on the surface to see the underside of the roof; that Petitioner was concerned about mold growth above the plaster ceiling and Petitioner wanted to verify whether that was the case; that there were two-inch holes drilled into the ceiling allowing a bit of access into the ceiling above; that he collected tape-lift samples from the roof deck; that he analyzed eight of those microscopically to see if there were mold growth structures; that he explained to Petitioner that it is difficult to work on the roof because there were only two-inch probe holes; that it was difficult to access; that he also did a swab sample from above; that he reached the joists; that he took additional samples; and that he took air samples in the subject premises in the living room and bedroom and one as a reference level outside and one where he could draw from the ceiling cavity through the probe holes.

Petitioner's First Report says that moisture readings in the subject premises revealed all areas to be dry; that probes about two inches in diameter had been made into the ceiling in the living room/kitchen and bedroom area; that Petitioner's Mold Expert took eight surface samples; that tape-lifts were collected; that six samples showed no fungal spores whatsoever; that two surface samples from a wood deck on the roof and outside of the subject premises showed rare levels of fungal spores and light spore counts; that there was one spore of a species called "stachybotrys" in the living room and bedroom, meaning "black mold," which is a cause for concern; and that air samples indicated moderately elevated levels of mold spores known as penicillium/aspergillus spores.

Petitioner's Mold Expert testified that most of his samples were negative, showing no evidence of mold growth; that there were samples from a wood deck where mold growth was present on the slide; that the difference is that the presence of mold spores on a tape-lift is normal, but conidiophores, the structures observed on the tape-lift, are an indication that mold is actually growing on a surface; that one of these samples from the holes did have light amounts of growth of penicillium; that there were hyphae, leading to some suspicion that there was mold growth on the underside of the deck in the plaster ceiling; that he sent the sample that he found to an independent lab and they confirmed that there was light mold growth in that location; that the swab sample from above was cultured for mold and it came out negative, which can happen if spores are not viable or if they do not grow in that culture

reading; that air samples were generally low; that there was a presence of something inside the subject premises which would provide evidence that there was residential or hidden mold growth that could impact quality; that there was a settled dust sample from the surfaces such as furniture and other items; that the lab reports determined that there were over a million spores per gram of dust; that the dust had various species of aspergillus; and that this finding did not reflect normal house dust.

The Third Expert's Involvement

The Order noted that experts hired by each side had come to different conclusions and that the parties stipulated to retain a third expert "presumably to 'break the tie' and hopefully bind the parties to the findings." Respondents submitted into evidence a stipulation between the parties dated February 1, 2019, providing that the parties had reviewed the proposal dated November 10, 2018 sent by Veronica Kero ("the Third Expert"), and providing that the parties agreed to retain the Third Expert to perform a mold inspection.

The Third Expert testified that she is a principal of Omega Environmental Services; that she has thirty-one years of experience in the field of mold assessment; that she does mold and moisture intrusion assessments; that she is licensed and certified; that Petitioner and Respondents jointly retained her; and that she inspected the subject premises on February 21, 2019. Petitioner testified that he was there when the Third Expert inspected the subject premises.

The Third Expert testified that the subject premises is a small apartment; that it is a one bedroom/studio with a living room, bathroom, and kitchen; that she was in the subject premises for over an hour with her associate; that she went up to the roof above the subject premises; that the roof appeared to be newer and in good condition; that there was ponding from snowmelt; that there was brick repointing work that had been done as well; that she did not see water intrusion from the brick work or the roof; that she did a mold assessment in the subject premises; and that the Third Expert issued a report ("the Third Expert's Report").

Respondents submitted the Third Expert's Report into evidence. The Third Expert's Report stated that there was no current evidence of mold or water damage; that most wall and ceiling finishes were found to be mold-resistant hard plaster; that there were eight times more mold samples in the kitchen than the outside and eighteen times more in the bedroom; that significant amounts of settled construction dust in the subject premises may have interfered

with sampling, causing moderately elevated mold air counts; that significant particulates were present in the environment; that moderate mold air counts were identified in the bedroom and kitchen of the subject premises; that penicillium/aspergillus-like molds, considered water-indicator molds, were the predominant mold air types identified in the sample; that certain types of penicillium/ aspergillus-like molds are known to be allergenic and pathogenic in sensitive individuals; that, since all dust contains some mold, significant amounts of settled construction dust in the subject premises may have interfered with sampling, causing moderately elevated mold air counts; that some probe cuts had been made before her inspection; that probe cuts are typically made with engineering controls to reduce and control dust generation; that there was no evidence of significant water intrusion from exterior sources; that there was minor water damage on drywall behind a kitchen sink possibly related to a plumbing issue in the west wall; and that the Third Expert recommended a removal of water-damaged drywall above a sink, that Respondents address a possible spot-plumbing issue, a full cleaning of the subject premises with HEPA vacuums to remove dust and particulates, and repeat air-testing for mold to verify the removal of dust and to document lower representative mold air counts.

The Third Expert testified that she was in the subject premises when the survey was done; that she followed regulations and guidelines; that they first went in to determine if there were ongoing mold issues; that they did a water intrusion test and took air samples; that the subject premises was a dry apartment except for a minor water spot by the kitchen sink from an adjoining apartment that did not cause her concern; that she looked for ventilation and cleaning; that the contents were all gone; that she noticed probe holes cut into ceiling; that she did not cut [*12]those; that she did air sampling indoors and compared it to outdoors; that there was a moderate level of mold in the air, which she attributed to dust in the subject premises; that she did not do other tests, just moisture readings; that the subject premises had not been cleaned; that there was dust on the floor and windowsills; that the subject premises was exposed to ceiling assembly, which is not a normal occupied condition; and that if someone was living there they would have done normal housekeeping and ventilated and holes would have been sealed.

The Third Expert testified on cross-examination that she was first contacted before February of 2019; that she was told it was going to be a joint retainer; that she does not know who first reached out to her firm; that she was retained to provide the view of an independent third party; that she did not remember if she reviewed any documents before she came to the subject premises; that she did her own independent inspection; that she had not done any research on the Building before coming to the subject premises; that she had been told that

there had been leaks and a mold issue; that she had very little information; that it is common that she does not know information about a building before she inspects; and that one thing that made this case different is that the parties retaining her limited the amount of information she had so that she could be objective.

The Third Expert testified on redirect examination that she does not know who Respondents are.

Petitioner's Second Report

Petitioner testified that Petitioner's Mold Expert inspected for mold a second time in November of 2019; that Petitioner was in New York for a hearing and as he ordinarily does he went into the subject premises to check on it; that he saw a change in the bathroom ceiling that produced a large bubble of paint hanging; that he noticed the air pressure in the subject premises; and that there was a hole in his closet with air is always blowing out of it.

Petitioner testified on cross-examination that in September of 2019 he noticed the distorted paint on the bathroom ceiling; that he arranged an inspection with Petitioner's Mold Expert; that Petitioner's Mold Expert asked him to make the holes bigger so that Petitioner's Mold Expert could stick his head or even his shoulder into the ceiling cavity; that he and Petitioner's Friend expanded the eight probe holes by connecting the dots with a rip saw so that four holes were eventually there; that there was no negative pressure machine used when the rip saw was being used; that particulate matter was released from the ceiling into the subject premises when that happened; that he did not apply mold remediation like plastic to separate the rooms when they used the rip saw; that they had plastic on the floor, opened the window, and closed the bathroom door; that he did not use a tack cloth outside the door of the subject premises; and that it took Petitioners' Friend about five minutes per hole to make the cuts.

Petitioner testified on redirect examination that he put duct tape over the probe holes because he knew there was dust and mold there.

Petitioner submitted into evidence a second report that Petitioner's Mold Expert generated ("Petitioner's Second Report"). Petitioner's Mold Expert testified on the voir dire for Petitioner's Second Report that Petitioner's Second Report, dated December 1, 2019, was based on a survey that Petitioner's Mold Expert undertook of the subject premises on November 20, 2019; that there were some larger openings in the ceiling; that Petitioner was

with him in November of 2019; that he does not remember if Petitioner wore protective gear; that he wears [*13]gloves; that he did not wear a mask; and that in 2017 he had no knowledge of debris that was above the ceiling. [\[FN2\]](#)

Petitioner's Mold Expert testified that, in November of 2019, there was an opportunity to go above the plaster ceiling in this inspection because of openings that had been made in the bedroom and living room; that he was able to observe the cavity above the ceiling; that there was about two feet between the ceiling and the roof deck; that there was wood construction on a wood joist roof deck; that he inspected all of openings that were made; that he took surface samples from the surface of the wood and the underside of the wood deck; that he took tape-lift samples and a vult [sic.] sample piece of material, i.e., a piece of plaster that he sent to a lab; that the ceiling is a plaster ceiling; that he saw visible mold on the back of that board; that he took a sample and sent it to a lab; that the lab identified a heavy growth of mold on that ceiling; that he took a tape-lift from that and analyzed it himself and found mold; that observable black spots showed mold growth; that he took samples where he can see the growing mold; that the tape-lift on the microscope is mold growth; that he packaged a paper on the board and sent it to the lab; that the lab cultured it; that the lab identified various genera of mold growing; that the lab identified a few million spores per gram when they cultured it; that "culturing" means that a lab takes a sample of material and put it on a petri dish, where the samples will incubate; that the lab result is a "culture analysis of bulk sample" which is in Petitioner's Second Report; that they found penicillium, aspergillus, and various other species of mold; that for that bulk sample they analyzed material directly under the microscope; that there was not a heavy growth of hyphae; that there are reproductive and vegetative structures of mold growth; that there was some light growth of another spore; that there were mites and fecal matter; that mites are late colonizers who show up a couple of months after the mold does; that mites require a surface to be wet for a [*14]long time; that a lab concluded that there is mold growth or fungal growth on the top side of the plaster ceiling in the bedroom; that he went above the ceiling in various rooms; that Petitioner's Second Report shows visible mold growth on the underside of the roof, the support joists, the decking material, and beneath the roofing; that he sampled that surface and sampled in a lot of different areas; that the lab identified some amount and some genera of mold growth that is in Petitioner's Second Report for tape-lifts; that most of the ceiling in the bedroom is made out of sheetrock-like material; that a sample from Petitioner's Second Report was taken from there; that one sample is taken from the square taken from the ceiling; and that above a ceiling outside the bathroom there was growth as well.

Petitioner's Second Report memorialized that there was a visual inspection of the subject premises and the roof; that there was testing of walls and floors for moisture; that there was a tape-lift sample; that there was a bulk sample collection; that in November of 2017 there was mold growth found above the ceiling, impacted by water intrusion from leaks from the roof and parapet walls; that leaks had occurred since 2004, for fifteen years, due to a defective design; that Petitioner's Mold Expert used a moisture meter; that a water leak that occurred through the bathroom ceiling had not been there in 2017; that this leak caused visible fungal growth on the ceiling; that test results from a tape-lift sample showed spore-producing mushroom structures; that the bathroom leak appeared to be from around the exhaust vent at the roof level and indicated that Respondents did not adequately address roof leaks; that a failure to remedy this intrusion could lead to future water leaks; that all other areas of the subject premises tested dry and there were no other areas with evidence of active water leaks; that four probe openings had been made in the ceiling to allow access to the roof deck and the space above the ceiling; that there was a strong flow of air from the ceiling cavity into the subject premises, so mold growth above the ceiling would be a source of spores in the subject premises; and that there was visible mold growth on the wood roof deck throughout the living room and bedroom in the subject premises.

Petitioner's Second Report showed that four tape-lift samples were collected from the roof deck at each ceiling probe opening: the kitchen/living room deck at the opening by the bathroom door, which had moderate spores showing growth of aspergillus and penicillium; the kitchen/living room deck at the opening by the window, which had heavy growth of spores, hyphae, and conidiophores of penicillium; the bedroom roof deck above the window, which had very light growth of aspergillus and penicillium; and the bedroom roof deck by the wall between the bedroom and living room, which had moderate growth of penicillium. Petitioner's Second Report also memorialized that a bulk sample of lath board above the ceiling in the bedroom revealed growth of penicillium, aspergillus, chaetomiium, and stachybotrys and mites and fecal material, who are late colonizers of damp materials and can cause allergic reactions; that a culture had 3.3 million colony-forming units per gram dominated by different species of penicillium and aspergillus, which produce mycotoxins; that a one square-foot piece of plaster and lath board was removed from the ceiling and the upper side had visible mold growth and a tape-lift revealed growth of penicillium, aspergillus, chaetomiium, and stachybotrys; that an inspection of the roof revealed evidence of ponding by one scupper and cracking in the roofing around the bathroom vent; that mold growth was found on the underside of the wood roof deck above the bedroom and living room ceilings, on the plaster lath board making up a portion of the bedroom plaster ceiling,

and on the bathroom ceiling; that an air sample in the bedroom showed low mold growth although the sample contained chaetomium, which is an indicator of mold [*15] growth and was not detected outside; that an air sample in kitchen/living room showed penicillium/aspergillus growth; that an air sample of bathroom showed elevated penicillium/aspergillus growth; that a sample above the bedroom ceiling showed domination by penicillium/aspergillus growth; and that a sample above the living room ceiling had low levels of growth.

Petitioner's Second Report contained conclusions that visible mold growth was above the ceiling on the roof deck and joists and on portions of the plaster ceiling in both the living room and the kitchen; that the bathroom ceiling had mushroom growth; that there was mold growth above the ceiling; that air flows from above the ceiling due to significant positive pressure above the ceiling; that mold growth caused elevated levels of spores in air above the ceiling and the spores move with the air currents through openings around light fixtures, vents, cracks; that water leaks were still occurring the bathroom ceiling; and that Petitioner's Mold Expert recommended a removal of all ceilings in bedroom, kitchen, living room, and bathroom, a cleaning of the wood roof deck and joists above the ceiling, an application of a biocide encapsulant to the roof deck, a repair of the roof leak around the bathroom exhaust vent, an inspection by an engineer or an architect to inspect the roof to assure an elimination of water intrusion, and mold removal.

Petitioner's Mold Expert testified that his results, in Petitioner's Second Report, showed no mold growth on a joist; that a sample of the actual deck above the living room ceiling by the bathroom door showed a growth of penicillium; that a wood deck above a window was found to have penicillium growth; that there was evidence that water came through an area above a window where Respondents had workers take plaster off the wall; that he took samples in the bathroom; that a new sheetrock ceiling had been installed which had water staining and water damage on it; that a photograph in Petitioner's Second Report showed a bubble in the ceiling; that he poked a hole in that bubble; that a photograph in Petitioner's Second Report showed mushroom growth and fungal growth caused by more water damage; that the growth was not present in 2017, so his observation was of new water damage since 2017; that he inspected the roof and took a picture of it; that this area of that leak seemed to be in the same area as that event, although he did not know for sure; that spores that he observed require a lot of water; that air sampling showed that the bathroom also had elevated levels of spores; that the odds of his finding this in the bathroom being a statistical variation was small; that the difference is an order of magnitude; and that AIHA says that air samples where there is an order of magnitude difference tells him something.

Petitioner's Mold Expert testified on cross-examination that that he was only at the subject premises two times; that he reviewed the Third Expert's Report before his testimony; that he understood that Petitioner had more access to the ceiling cavity and there was more leaking; that he thinks Petitioner had someone open up holes further; that the water bubble he saw was two to three square feet at the most; that he photographed the vent pipe because he saw cracking around the caulking or water seal around the vent pipe; that it was his understanding that repairs had been done to the roof and the parapets; that he was not there when the Mold Assessor did work and did not speak with Respondents; that in 2017 he saw a number of two-inch diameter probe holes in the ceiling; that those same holes were not there in 2019; that there were four square-foot probe holes in 2019; that he used a ladder to get within that area; that his shoulders were only in the cut in the bathroom; that he could not get his shoulders into the holes in the living room at all and only in one hole in the bedroom; that it was maybe two by a two opening; that he was in the subject premises about one-and-a-half, maybe two hours; that Petitioner was [*16] with him the entire time; that Petitioner went with him to the roof deck; that he does not remember if Petitioner was wearing protective gear; that the subject premises is 800 or 900 square feet; that he does not remember whether Petitioner had a respirator or a Tyvek suit on; that he did not observe Petitioner wheezing; and that he did not observe that Petitioner experienced any symptoms.

Respondent's Mold Expert's Observations

Respondents' Mold Expert testified that mold assessors are not medical professionals, so they do not render opinions regarding someone's sensitivities; that he understands that probes into ceiling were done; that such probes are not a customary way to inspect for mold after a remediation when indoor survey results are showing no mold growth and low mold spores; that mold growth or mold spores in a ceiling cavity would be contained and a ceiling would be a barrier keeping spores being able to come into the environment; that this is considered an engineering control; that barriers are commonly used to protect people from noise, chemicals, and radiators; that one should not damage the integrity of a barrier to determine if there is mold growth; that making a probe could recontaminate the subject premises; that the subject premises has a ceiling and, above that, the underside of a roof, and then above that, the exterior of a roof; that that is where the roof deck was placed on, outside of the ceiling, not within the subject premises; that air sampling is not a basis to test for mold because samples fluctuate; that one sample in the same location several minutes apart can lead to different results; that air samples have no numerical regulatory standards; that when you get a

result, there is no right number or wrong number for that result; that he was concerned that Petitioner's First Report said that the concern was particular to someone with asthma or sensitivities; that Petitioner's First Report speaks of damp or moldy environments, but the subject premises was not damp or moldy; that Petitioner's Mold Expert took readings of fungal spores outside and inside; that the outdoor sample showed 4,400 spores per cubic meter and the sample above the living room ceiling had a total of 520 fungal spores per cubic meter and was dominated by "pen-asp" spores; that only meaningful comparison is outdoor to indoor counts, and the counts would show that in living spaces, total spore counts were lower than outdoors; that the spore that Petitioner's Mold Expert identified is a very sticky spore found on surfaces and which can adhere to construction dust but is not found in the air; that Petitioner's First Report mentions penicillium, which is a universally-found mold spore; that the report said that fungal density was less than one light mold growth; that the labs that Respondents' Mold Expert uses mean possible growth when they say "light fungal growth"; and that it is possible that this could have been caused by putting probe holes into the ceiling.

Respondents' Mold Expert testified on cross-examination that if a surface was dry, the Mold Assessor does not recommend mold remediation for that area; that if a moisture meter identifies boundaries on a wall, only that section of wall would be removed; that the Mold Assessor would not remove a wall floor-to-ceiling; that walls with floor-to-ceiling moisture would have to be removed, moldings and all; that if a mold assessor believes that something is hidden, they would recommend mold remediation, but they would not extend those boundaries; that it is standard that they only take samples of parts of walls that are wet; that, as a licensed mold assessor, he would recommend mitigating water intrusion before performing remediation; that the Mold Assessor does not get involved with a mold remediator's work, although they [*17] recommend companies; that remediation would have no impact on whether a wall is dry or wet; that he came to the conclusion that the surfaces in the subject premises were in fact dry and free of mold growth; that no recommendations were warranted; that the Mold Assessor looks at exposure and a potential cause of harm when they perform surveys; that the Mold Assessor does not look at an individual's specific diagnosis; that there are no established levels at which some are affected and others are not; that new science has taken away some of the stigma of black mold as a part of family of mold; and that black mold can cause allergic-type reactions and can cause dermatitis.

Respondents' Mold Expert testified on redirect examination that the probe holes in the ceiling made after a mold remediation caused the finding of mold in Petitioner's Second Report.

Petitioner's Mold Expert's Observations

Petitioner's Mold Expert testified that a dust sample is a good way to figure out if there is hidden mold growth that you cannot see; that in a typical healthy house, settled spores would be dominated by one species and not aspergillus; that aspergillus shows reservoirs of mold growth; that the point of the survey is to see if all the mold has been eliminated or if there are reservoirs of mold growth; that hidden mold can still affect air quality; that mold spores are aerodynamic; that mold spores move with the air, settle on a surface, and grow if there is sufficient water; that mold spores travel with the air, so something that seems like a barrier is not; that air can flow through walls, light fixtures, electrical outlets, and very small spaces; that ceilings are not airtight; that AIHA is of that opinion, too; that AIHA says that mold assessors should try to find if there is hidden mold growth; that if you miss hidden mold growth, the person who lives with such hidden mold growth can be subjected to it and it can affect their health; that even the Mold Assessor's report warns Respondents that an abatement was only addressing mold and water damage that were accessible and visible; that everyone agrees that air samples have to be interpreted carefully and can be wrong; that they use air samples when mold growth is hidden and they do not cut holes in the wall or the ceiling; that the way to do an assessment is to test the air and see if it is normal compared with what is outside or one can cut holes in the walls or ceilings where you know water came and in and actually test them; that one or the other would be a useful way to test it; that the Mold Assessor was not warranting that there is no mold; that the Mold Assessor did not act unprofessionally; that in his opinion it is better to do air sampling to get additional evidence about whether there is mold, especially where there is a pathway for water; that when you read EPA guidelines and NIOSH, they publish questionnaires for people complaining about air quality in a building; that they should talk to the occupants because you can get information about the chronology of water leaks and symptoms about the sources of exposure; that an inspector can find out about patterns from talking to occupants, such as whether there are timing patterns, for examples in the times of the day; that he recommended opening up more areas of the ceiling, in the bedroom primarily, and make probes in the living room to investigate above the ceiling and clean where mold growth was identified; that he recommended that the subject premises be cleaned to remove settled dust and contamination; and that Respondents should vacuum dust from surfaces so that spores in the dust grow.

Petitioner's Mold Expert testified that aspergillus is like an air sample in that it tells us that there is a problem and maybe that they dispersed spores when they did a mold abatement

and did not do a good job cleaning up, although the Mold Assessor reported that it cleaned up [*18] and did a good job; that aspergillus is genus and is more associated with allergies that can hurt immuno-compromised people; that he thought that there was mold in the ceiling that could have been picked up in air samples; that two samples had chaetomium, which is another indicator, so to find it in indoor samples is a concern; that there was also stachybotrys, which does not easily get in the air and to get it indoor shows reservoirs of mold growth; that there is no basis to disqualify it by saying that it is just settled dust; that the Third Expert should have said this is not a clean bill of health, not indicative of a normal background, and should have been looked at; that he thinks that their conclusions were wrong and that there is a level of mold spores that cannot be explained by other than sources of mold still present; that settled dust in a normal building would always be dominated by clatasporium, which grows on trees and leaves; that in a normal house with no water damage, if that dust was being kicked into the air that is what should have showed up; that stachybotrys might require further investigating but does not mean that there is a strong source, meaning that this is not normal and we should look further; that he agrees with Respondents' Mold Expert's recommendation to clean and HEPA-vacuum and then repeat the testing; and that he would also include cuts and probes into the ceiling given that water came through above.

Petitioner's Mold Expert testified that the Mold Assessor wrote a report in 2016 stating that there were wet walls in the bedroom from floor to ceiling, which should have told them that it is likely wet above the ceiling; that water was in the wall and it went all the way up to the ceiling; that the ceiling had mold growth and the area above the ceiling had mold growth; that the Mold Assessor should not have stopped at the ceiling when they removed the moldy walls and they did that abatement; that the Mold Assessor should have gone further and included the material above the ceiling; that the Mold Assessor failed to fully identify hidden mold above the ceiling, which commonly happens in water damaged buildings; that, in his opinion, it was a mistake to take plaster off the wall given that there is mold growing above it and they should have tested it first to make sure they were not disturbing mold; that since there is mold right above that, he can conclude that water ran down that wall; that the water would have grown on wood around the window under the roof deck; that it is possible that they disturbed mold growth around the living room window; that those results should tell anyone that there is mold growth in the plaster ceiling in the bedroom and on the wood deck, areas that the Mold Assessor never inspected; that all surface samples indicate that the mold abatement that the Mold Assessor organized did not address the roof deck; that there was additional mold growth after the abatement because leaks continued; that the ceiling samples,

roof deck samples, and air samples constitute conclusive evidence of mold growth in the ceiling in living room; that mold growth in the bedroom is not that high based on his inspection; that he concluded that there is mold growth that should have been found by the Mold Assessor and should have been dealt with; that mold growth leaks impacted bathroom ceiling; that when a building gets water damage, the places that get wettest and hardest to dry out are where the water gets trapped; that the Mold Assessor only needed to tell the Project Manager's company to cut a square-foot hole in the ceiling to test for mold and they did not do that even though such a probe is a common practice; that the Mold Assessor did a terrible job; that his first survey showed that something is not normal; that rarely did he see a spore in the bedroom; that the Third Expert took air samples, which is what the industry does; that the Third Expert's samples came out high levels of penicillium/aspergillus spores in comparison to outdoor samples; that the Third Expert concluded that the spores were not from above the ceiling but from dust all over the subject premises; that Respondents went to [*19] great lengths to avoid cutting probe holes as per best practices; that even if it is not best scientific method, since this is about a health hazard, it makes sense to do it; that the ceiling is now open and can be tested; that if an occupant has experienced symptoms, and a landlord had other test results, that should have told Respondents to go and look again; that in the face of strong evidence, they failed to go back in a way that any other mold assessor would have done; that Petitioner described symptoms consistent with damp moldy buildings; that the pattern became worse when he came into the subject premises and improved when he left; that sometimes they think they fix something and an occupant still has symptoms and they have to go back and see if there is something they missed; that it is hard to find mold sometimes; that he does not replace plaster when they do a mold remediation until a leak in the exterior masonry is fixed; that he disagrees with the Mold Assessor; and that the Mold Assessor did not provide good advice to Respondents, i.e. a warning about hidden mold.

Petitioner's Mold Expert testified on cross-examination that if an apartment is left vacant then settled dust would accumulate and in that settled dust there would be spores; that the more air that moved from the ceiling into the room, the more spores would go into the room, meaning that probe holes can let spores in; that if you eliminated the openings it would limit air flow and limit spores, although it depends on other factors since, for example, a light fixture is an opening in a ceiling; that other than the bathroom ceiling he did not find other areas with active leaks; that there was a new leak that occurred that was not there in 2017; that he cannot say that it was a continuing leak; that it was not leaking at the time that he was there; that he does not know if there was a continuous leak; that it was not going on in 2017; that he does not know if it was repaired, although it was not raining when he was there; that

the mold can take two weeks or two months; that when there is a mushroom growing it is more like two months; that Respondents sprayed a biocide on the bathroom deck; that a biocide should have been sprayed in the areas that he reported; that biocides are chemicals and some people might be sensitive to them; that they are designed to not get in the air; that once they are on the wood they stay on wood; that the DOHMH Guidelines show that you shouldn't use them liberally, but only as a last resort; that you can use a smoke tube test to test a visual movement of air, where smoke is released and when it goes to the ceiling you can visually see the smoke moving into the apartment; that he does not know if he tested every hole but he tested the bedroom; that the smoke tube test would not be good if it was a completely sealed ceiling, as it would not show movement of air; that he did not conduct other tests to see if there was air flow; that there are other such tests; that the bubble in the ceiling was two square feet; and that there is no standard requiring consideration of an individual's sensitivity when remediating mold.

Petitioner's Mold Expert testified on redirect examination that he will do testing in medical facilities where patients who received transplants are convalescing; that there is a stricter standard for preventing mold in areas like that as such patients can tolerate a lower level of mold than the rest of the population; that if they were in a hospital setting or there were someone with immune system functions they would have a higher standards; that the methodologies for abating mold are similar no matter who is going to be exposed, but the idea is to take out the mold; that a lot of the guidelines say that if there are persons who are sensitive they should not be in the premises at all if they are outside a containment area; that you want to make sure you have a higher level of cleaning; that the published procedures for mold abatement do not differentiate between highly sensitive versus people with normal sensitivity; that studies on COVID-19 showed that people in offices with sealed walls adjacent to someone who had [*20] COVID-19 are at risk because of droplets coming through any penetration in a wall; that the mold spores could move through such spaces as well; that we do not build airtight walls; that a wall in itself is not an air barrier; that a transplant patient in a hospital requires a HEPA-filtered air supply, where the room is pressurized, so air in the room flows through the room and it so none of the air flows into a room from elsewhere; that that is how you make it sterile; and that operating rooms have highly pressurized air.

Petitioner's Mold Expert testified on recross examination that mold abatement is not changed based on a person's sensitivity; that they may recommend removing someone from an apartment during an abatement; and that a mold spore will not go through material like sheetrock.

The Third Expert's Observations

The Third Mold Expert testified on direct examination that she reviewed Petitioner's Mold Expert's reports; that Petitioner's Mold Expert was very thorough; that typically probe holes are drilled before remediation could be done; that there are no health concerns in the subject premises; that the Mold Assessor's recommendations were customary; that she was hired to see if Respondents complied with the Mold Assessor's recommendations; and that Respondents did so comply, in her opinion.

The Third Expert testified on cross-examination that some people do not like air samples; that she sampled the air because she was told that it was for suitability for reoccupancy; that no testing was required because there was no water intrusion, as per mold guidelines of the City of New York; that water mapping and testing for water intrusion is what had to be done; that her finding that the indoor level was eight to ten times the outside level was indicative of mold colonization, meaning that there was mold in the subject premises; that the type of mold she found was penicillium/aspergillus, which is a common mold that is frequently detected; that mold is a natural constituent of dust; that clasporium is a tree mold found in nature; that whether that species affects people differently than other species depends on the person; and that penicillium/aspergillus can cause allergies.

The Third Expert testified on rebuttal that she had reviewed transcript of Petitioner's Mold Expert's testimony; that she had reviewed Petitioner's First Report and Petitioner's Second Report; that she knew that Petitioner's Mold Expert referred to "hidden mold;" that in her professional opinion she would reword that as hidden water damage that would cause a mold breakthrough to occupy living space; that Respondents' remediators' reports followed a standard tracking protocol; that they used a water meter; that all above-ceiling spaces that are not meant to be occupied have mold spores; that intact construction is for fire safety and also prevents air flow, so if construction is intact Petitioner's Mold Expert's testimony about air flowing and taking spores with the air is not true; that she has not seen evidence of mold spores flowing through light fixtures or electrical outlets as Petitioner's Mold Expert testified; that you could test for mold in a room, but that test is not specific to whether mold spores enter a livable area through an electrical outlet; that there may be a possibility to set up a sophisticated procedure to test that, but such a procedure would not constitute a typical mold testing and inspection protocol; that the DOHMH Guidelines do not set such a standard; that she did not see a survey that Petitioner's Mold Expert conducted as to that; that when the

AIHA refers to mold traveling, it means an improper outlet with gaps around it; and that she did not see such gaps in the subject [*21]premises.

The Third Mold Expert testified in rebuttal that in February of 2019 she found a small water spot in the kitchen, which they reported; that otherwise the subject premises was dry; that she believes there is hidden mold anywhere in any place that is not cleaned on a regular basis; that she would not recommend intrusive testing like cutting holes if the moisture readings showed a dry ceiling; that if the Mold Assessor took moisture readings, then the Mold Assessor acted in a correct manner; that air testing is optional; that many guidelines are careful about air sampling, because mold is present everywhere in nature so air sampling can lead to false positives that do not show what is going on in an apartment; that if there was a suspected or concealed water source they should do invasive testing, but that was not the case here; that she would recommend an infrared camera because then you do not have to cut the ceiling; that one cuts a hole in a ceiling, one should do so in a tent so as to avoid dispersing dust all over the subject premises; that she observed cuts in the ceiling; that the probe holes in the subject premises without tents gave her a concern that dust could have been spread; that you have to be strategic when you do a cut because otherwise it just amounts to a demolition of a ceiling; that dust generation would significantly increase the mold counts; that a mold reading resulting from that would not show hidden mold so much as dust disturbance; that the Mold Assessor was not unprofessional in refraining from air sampling, but she would have given that this is a legal case; that she would not do air sampling until all known sources were removed; that she does not think that one should sample a ceiling area because it is not clean or ventilated and it is not designed to have low mold counts; that if she found pockets of water, like if the roof and façade were not repaired and there was still water coming into the Building, there could still be mold behind the walls; that if building owners failed to correct the roof or exterior, there will be water leaks and you will see hidden mold; and that the roof here was completed, so it is a different situation.

The Third Mold Expert testified on rebuttal that an individual's health is not a factor in conducting a mold remediation, because the intent of a remediation is to remove the mold that would affect the general public, as immunities change and people move in and out; that Petitioner's Mold Expert's recommendations were not proper; that Petitioner's Mold Expert sampled correctly but he overreached his sample procedure; that in the later visit in 2019 after she was there in February there was a roof drain caulk; that a minor defect was found, but Petitioner's Mold Expert did not find that that caused mold; that she does not have a concern about a continuous water presence; that there was a minor kitchen issue and the caulk but that happens in buildings all the time; that plaster is not a mold-sensitive material

because it does not have cellulose backing; that mold requires a food source in order to grow; that it is very common to see faint grey staining because structural wood is not finish-grade wood; that such wood is not meant to be perfect with no staining; that such wood is more resistant than softer woods; that it is known at some point that it is going to get hit with water; that it is not like softer wood or interior wood; that it appears to be a normal ceiling cavity to her in an older building; that a smoke tube test is used for indoor air quality evaluations; that there are more sophisticated ways to test air flow; that you need to do a professional ventilation study with open windows; that a manometer is a device that is used to measure positive/negative pressure, as a better way to assess air flow; that it would not be applicable to the Mold Assessor because they were doing work without wall cuts; that there is no proof that COVID-19 can go through a solid wall; that air takes a path of least resistance; that she has never seen a published study showing that mold spores go through intact sheetrock or intact plaster; that there are microcracks that are not [*22] visible; that there are walls that are close to airtight when they are caulked, to stop a fire from moving, as walls with a two-hour fire rating are; that the Mold Assessor acted in a professional manner considering that they took moisture ratings that were dry; that Petitioner's Mold Expert's readings showed that the ceiling was dry; and that there was no justification to open a ceiling assembly.

The Third Expert testified on cross-examination on rebuttal that statistics on a table that she filled out constitute a "spore trap," not culture samples; that air samples are not cultured; that swab samples would be cultured; that stachybotrys and chaetomanium are mold that like water; that usually they are low-count; that you would not see them outside in high counts; that they had penicillium/ aspergillus, an example where some experts say that is "inside mold," but there can be a few low counts outside; that when she first inspected in February of 2019 she did not know for sure if it was raining; that more likely it was a sunny day; that if there was extreme weather they note it; that you can have a plumbing issue that leads to water that would not be dependent on rain; that it is possible that a building can have water damage and the moisture meter might not pick it up, if there is a crack and you only see the water when it rains; that Petitioner's Mold Expert found a roof drain caulk issue; that she was confused by his discovery of a crack in the caulk and a water bubble, but she did not find an elevated reading; that the Building is an older building; that it was not unusual for there to be situations where water damage could occur; that she was not surprised to see a bubble because you see it around showers; that she did not see pipes going to where the bubble was; that the subject premises is on the top floor of the Building; that she did not see mushroom growth in the photographs from Petitioner's Second Report; that she saw two black dots; that

she did not think that those were stems, but lines that look like cracks; that Petitioner's Second Report depicted a spore trap, the same method that she utilizes; that the counts showed mold growth, but interference has to be ruled out; that if the ceiling was opened that would not tell us about the living mold growth; that one should remove mold based on what the moisture meter and an infrared camera show you; that a full demolition of a ceiling is not recommended; that it is all based on moisture mapping; that air sampling is not a part of moisture mapping; that an infrared camera is better; that hidden mold exists everywhere in hidden ceiling cavities; that it is impossible to fully remove all mold; that hidden mold should be removed if it could impact the living space; that mold is an allergen; that lath board can have mold on the surface; that after a remediation is done, reassessments are typical; that it is possible that a remediation can not be done properly; that a drawback to not doing air sampling would be not assessing the actual living space and one would be denied a quantitative measure in the subject premises; that air sampling would not be useful to find hidden mold; that you could air cross-flow from the ceiling to the floor level; that if there is not air flow, you would have minimal air flow; that it would not be significant; that hot air rises; that a fire-rated wall does not allow for air circulation; and that the ceiling was most likely thick enough to be fire-rated, but she did not test.

The Third Expert testified on redirect examination on rebuttal that the subject premises was ready for reoccupancy.

The DOHMH Guidelines

Petitioner submitted the DOHMH Guidelines into evidence. The Guidelines state, *inter alia*, the mold is present almost everywhere; that in an indoor environment hundreds of different [*23]kinds of mold are able to grow wherever there is moisture and an organic substrate, i.e. a food source; that mold growth indoors can and should be prevented and removed if present; that water accumulation in indoor environments can lead to mold growth, which has been associated with human health effects; that indoor mold growth can be prevented or minimized by actively maintaining, inspecting, and correcting buildings for moisture problems and immediately drying and managing water-damaged materials; that a visual inspection is the most important initial step in identifying a possible mold problem; that a visual inspection should also include observations of hidden areas where damages may be present, such as crawl spaces, attics, behind wallboard, and insulation; that a moisture meter or infrared cameras to detect moisture may be helpful in identifying a hidden source of mold growth; that efforts should be made to minimize the generation and migration of any

dust and mold; that environmental sampling is not usually necessary to proceed with remediation of visually identified mold growth, although it can be helpful to confirm a visual inspection of mold or to find a source of indoor mold growth that cannot be visually identified; that environmental samples should be collected according to a plan that includes a clear purpose, and sampling strategy; that many types of sampling can be performed, for example, air, surface, dust, and bulk materials; that sampling methods for fungi are not well-standardized, however, and may yield highly variable results that can be difficult to interpret; that currently there are no standards or clear and widely accepted guidelines with which to compare results for health or environmental assessments; that in all situations, remediation entails correction of the underlying moisture problem; and that existing research does not relate the amount of mold growth to the frequency or severity of health effects, although as the presence of moldy materials increases, so does the potential for exposure and the need to limit the spread of mold-containing dusts.

Discussion

The Order granted Respondents' motion to dismiss "to the extent of directing a hearing on compliance with the [S]tipulation." The Stipulation obligated Respondents to, *inter alia*, correct the HPD Violation. After the work that Respondents shows that they engaged in, HPD inspected and dismissed the HPD Violation. To the extent that the parties dispute whether Respondents remediated mold in the subject premises, the focus of that debate was not about the wall where the HPD had issued the HPD Violation. Respondents have therefore proven that they corrected the HPD Violation.

The Stipulation further obligated Respondents to remediate mold conditions from Petitioner's complaint to DHCR seeking a rent reduction order, which included allegations of toxic mold in the ceiling of the subject premises. The Stipulation also obligated Respondents to remediate the mold conditions in the subject premises so as to meet standards for testing implemented by the Mold Assessor. The Stipulation provided that Respondents shall perform the Remediation Work "of professional standard [sic]."

Respondents' argument that they proved compliance with the Stipulation as a prima facie matter is straightforward. The Stipulation required that Respondents first remediate the exterior of the Building to remedy water intrusion. The unrebutted, detailed testimony of the Engineer and the Contractor, the evidence of DOB filings and permits, and the Third Expert's observations of the Building envelope proved that Respondents did the necessary work to

stop water intrusion. Even Petitioner's Mold Expert testified that his moisture readings showed that the [*24]subject premises was dry. The Stipulation then required that Respondents remediate the mold found in the Mold Assessor's First Report. The testimony of the Project Manager showed that Respondents engaged in those measures. The testimony of the Construction Company Owner showed that Respondents then reconstructed the subject premises following the mold remediation. After a mold remediation, a mold assessor must determine, *inter alia*, whether the work area is free of all visible mold and whether the remediator completed all work in compliance with the remediation. Labor Law §947(1). Respondents' Mold Expert, working for the Mold Assessor, made such a determination. Respondents' Mold Expert and the Third Expert submitted into evidence their reports and testified that Respondents' work rendered the subject premises fit for occupancy.

Petitioner does not dispute that Respondents engaged the Engineer, the Contractor, the Project Manager, the Construction Company Owner, or the Mold Assessor, nor that Respondents' contractors did the work that the evidence shows that they did. Rather, Petitioner disputes that the work that Respondents did effectively remediated the mold condition as required by the Stipulation. Petitioner's Mold Expert inspected the subject premises for the first time on October 12, 2017, around three months after the completion of the work, and found mold growth in the ceiling cavity above the bedroom, in between the ceiling of the subject premises and the roof deck above. The parties dispute whether Petitioner's Mold Expert's findings prove that Respondents did not properly remediate and the parties dispute the effect of mold behind a ceiling.

Respondents' Mold Expert and the Third Expert emphasized the primacy of water intrusion, as located by moisture meters or infrared cameras, in determining the locations for testing for and remediation of mold. In the absence of water intrusion, according to this argument, mold behind a barrier does not pose a health hazard to the occupants, particularly a barrier made of non-organic material like plaster that does not provide a food source for mold. While Petitioner's Mold Expert did not deny the importance of testing for water intrusion, he placed much more emphasis on Petitioner's complaints as a reason to probe behind the walls and ceilings of the subject premises.

The DOHMH Guidelines assist with a resolution of these disputes. The DOHMH Guidelines state that mold can grow where there is moisture and an organic substrate and that in all situations, remediation entails correction of the underlying moisture problem. This proposition, generally consistent with the testimony of all three experts, is hard to reconcile with Petitioner's Mold Expert's testing of the ceiling cavity on October 12, 2017, given that

Petitioner's First Report found that the subject premises was dry.

The DOHMH Guidelines further state that sampling methods for fungi are not well-standardized and may yield highly variable results that can be difficult to interpret, that currently there are no standards or clear and widely accepted guidelines with which to compare results for health or environmental assessments, and that existing research does not relate the amount of mold growth to the frequency or severity of health effects. Given this lack of a consensus view, the difference in opinions expressed by three credible experts is understandable.

If the views of any of the expert witnesses can be reasonable, the Stipulation guides the Court in determining the motion. While the Stipulation provided that the mold remediation shall be done according to a professional standard, the ambiguity in the DOHMH Guidelines as set forth above does not support the proposition that the means by which Respondents remediated the mold did not live up to a professional standard, as vouched for by both Respondents' Mold [*25]Expert and the Third Party Expert.

More troubling for Petitioner's opposition to this motion, however, is that the Stipulation specifically provided that Respondents shall remediate the mold conditions in the subject premises so as to meet standards for testing implemented by the Mold Assessor. A stipulation is a contract. [Matter of Banos v. Rhea, 25 NY3d 266](#), 276 (2015). The Court construes contracts to give effect to every word contained in the contract. *See Spaulding v. Benenati*, 57 NY2d 418, 425 (1982), [Gessin Elec. Contrs., Inc. v. 95 Wall Assoc., LLC, 74 AD3d 516](#), 519 (1st Dept. 2010), [J.P. Doumak, Inc. v. Westgate Fin. Corp., 4 AD3d 62](#), 64 (1st Dept.), *appeal dismissed*, 3 NY3d 635 (2004), *Taylor v. Muss*, 13 AD2d 245, 249 (1st Dept. 1961), *aff'd*, 11 NY2d 685 (1962). This canon of contractual construction means that the Court must give effect to the provision of the Stipulation that applies the standards for testing implemented by the Mold Assessor, the outcome of which would credit the visual inspection and the moisture meter testing that Respondents' Mold Expert, who worked for the Mold Assessor, engaged in.

Petitioner, who was represented by counsel, could have bargained for a stipulation where Respondents had to remediate according to the standards set by Petitioner's Mold Expert. Petitioner did not do so, an omission made all the more glaring in light of the specificity with which the Stipulation prescribed other methods for mold remediation, such as requiring Respondents to first seal the exterior, deploy brick replacement, and the remove drywall and plaster in particularly-identified walls. The parties thus demonstrated that they could get specific about what remediation entailed when they wanted to. "*Inclusio unius est*

exclusio alterius," a canon of contractual construction, *Two Guys from Harrison-N.Y. v. S.F.R. Realty Assocs.*, 63 NY2d 396, 404 (1984), provides that a specific provision that only applies to a particular circumstance implies the intended exclusion of that provision from other circumstances. [2626 Bway LLC v. Broadway Metro Assocs., LP](#), 85 AD3d 456, 457 (1st Dept. 2011). As the Stipulation specifically included both these details of the remediation process and that Respondents shall remediate according to the standards for testing set by the Mold Assessor, the text of the Stipulation compels the conclusion that the parties to the Stipulation could have not intended for Respondents to remediate according to the standards for testing set by Petitioner's Mold Expert, which for October 12, 2017, relied on methods other than a visual inspection of the surfaces of the subject premises and measurements of water intrusion. Similarly, as the parties charted their course by applying the testing standards of the Mold Assessor, Petitioner's Mold Expert's standards of hidden mold do not apply in derogation of the different standards of the Mold Assessor.

To the extent that Petitioner's Mold Expert's findings of mold on October 12, 2017 raise a fact question about the efficacy of the remediation, Petitioner's post-remediation conduct becomes relevant. In September of 2017, after the remediation, Petitioner had Petitioner's Friend to drill holes in the ceiling. The applicable regulations prescribe that work practices when assessing an indoor mold hazard require a minimization of the dispersion of dust and debris from the work area to other parts of the dwelling unit through such methods as isolating the work area with plastic sheeting and the use of a vacuum equipped with a HEPA filter at the point of dust generation. N.Y.C. Admin. Code §7-2017.9(b). Petitioner testified that Petitioner's Friend did not adopt these protections and that the drilling spread particulate matter in the subject premises. The Third Expert's rebuttal testimony clarified that the reason for rules like this is to avoid dispersing dust and increasing the mold counts, perhaps significantly. The Third Expert testified on rebuttal that mold found as a consequence would indicate not hidden mold, but dust [*26]disturbance. Petitioner's drilling of holes in the ceiling without protections disrupts possible causal links between purported shortcomings in the remediation and Petitioner's Mold Expert's finding of mold.

Petitioner's Mold Expert's finding of mold on November 20, 2019 raises a new issue, as Petitioner and Petitioner's Mold Expert testified to seeing a water bubble in the bathroom ceiling, indicating a level of water intrusion beyond what Petitioner's Mold Expert observed on October 12, 2017. The Third Expert did not see the bubble when she inspected the subject premises on February 21, 2019 and Petitioner testified that he first saw it in September of 2019, compelling the conclusion that water intrusion that would have caused the bubble occurred at some point in between those two dates.

To the extent that the standards that the Mold Assessor would apply relied more exclusively on water intrusion, then, the water bubble raises the possibility that even by the standards set by the Mold Assessor, that Respondents did not effectively remediate mold in the subject premises. However, Petitioner's Mold Expert provided in Petitioner's Second Report that the rest of the subject premises was dry and the mold that Petitioner's Mold Expert found was not in the bathroom, but in the living room and the bedroom. The Third Expert noted in her rebuttal testimony that Petitioner's Mold Expert did not attempt to establish a causal connection between the mold that Petitioner's Mold Expert found in the ceiling cavity in a different room from the one where Petitioner's Mold Expert found the water bubble. Moreover, the cuts in the ceiling at that point were much bigger than the two-inch holes that Petitioner's Friend had previously cut. Petitioner testified that in 2019 he and Petitioner's Friend used a ripsaw to cut sections out of the ceiling, again without the regulatory protections. On this record, the mold that Petitioner's Mold Expert found in the ceiling cavity in 2019 does not rebut the case that Respondents established that they remediated mold in 2017 as required by the Stipulation.

Even on a finding that Respondents complied with the Stipulation, Petitioner argues that Petitioner's Mold Expert's subsequent finding of mold warrants a denial of Respondents' motion to dismiss this matter, given that New York City Civil Court Act §110(c) empowers this Court to *sua sponte* employ any remedy for the enforcement of housing standards.

New York City Civil Court Act §110 indeed memorializes the expression of the Legislature that the public policy goals of the maintenance of housing standards override agreements that private parties may make between themselves, [*D'Agostino v. Forty-Three E. Equities Corp.*, 16 Misc 3d 59](#) (App. Term 1st Dept. 2007), as the parties here did in the Stipulation. However, while the Court in *D'Agostino*, *supra*, 16 Misc 3d at 59, found that an arbitration clause between the parties violated public policy insofar as it would have operated to deprive the Housing Court of its ability to enforce housing standards, a stipulation that resolves an HP proceeding by requiring an owner to remediate mold according to the standards of a licensed mold remediator using methods consistent with DOHMH Guidelines does not similarly offend public policy.

Petitioner is, in effect, asking the Court to order Respondents to correct a mold condition that Petitioner likely caused after Respondents remediated the mold as per the Stipulation that settled this matter. To the extent that Petitioner's opening up of the ceiling without the protections required by regulations caused the condition, Petitioner would not be

able to obtain civil penalties on any hypothetical default of Respondents of such an order. N.Y.C. Admin. Code §7-2116(b)(2)(iii). To the extent that another leak arose in 2019, two years after Respondents remediated the subject premises as required by the Stipulation, this HP proceeding [*27] does not have to be the means by which Petitioner pursues relief for that condition. *Schlueter v. E. 45th Dev. LLC*, 9 Misc 3d 1105(A)(Civ. Ct. NY Co. 2005). These circumstances do not give rise to an occasion for the Court to exercise its *sua sponte* authority to issue an order to correct on a five-year-old proceeding where Respondents complied with an agreement to remediate mold four-and-a-half years before this writing.

Accordingly, it is ordered that the Court finds that Respondents complied with the Stipulation and it is further ordered that the Court therefore grants Respondents' motion to dismiss this proceeding. The Court denies Respondents' motion to compel Petitioner to withdraw his complaint at DHCR as moot as the evidence shows that DHCR has already restored the rent.

The parties are directed to pick up their exhibits within thirty days or they will either be sent to the parties or destroyed at the Court's discretion in compliance with DRP-185.

This constitutes the decision and order of this Court.

Dated: January 19, 2022
Brooklyn, New York

HON. JACK STOLLER
J.H.C.

Footnotes

Footnote 1:HPD placed other violations on the subject premises for conditions not involving mold. HPD later dismissed those violations and they were not the subject of this hearing.

Footnote 2:Respondents objected to Petitioner's Second Report because Petitioner prepared Petitioner's Second Report for the purposes of this litigation. Normally, whoever prepares a record in contemplation of litigation is not doing so in the regular course of business, so doing so compromises the reliability that otherwise renders a business record admissible. [*One Step Up, Ltd. v. Webster Bus. Credit Corp.*, 87 AD3d 1](#), 11 (1st Dept. 2011). However, reports prepared by experts specifically for litigation can be admissible. See, e.g., [*Amaze Med. Supply, Inc. v. NY Cent. Mut. Fire Ins. Co.*, 12 Misc 3d 131](#)(A)(App. Term 2nd Dept. 2006)(an "accident analysis" of a technical consultant/accident reconstructionist submitted on

a summary judgment motion and a medical report after an examination of a defendant were in a form that was admissible), [Careplus Med. Supply, Inc. v. Kemper Auto & Home Ins. Co., 8 Misc 3d 127\(A\)](#) (App. Term 2nd Dept. 2005)(a report prepared by a consultant in support of a defense of a lack of causal nexus between an accident and a plaintiff's injuries was admissible). Respondents themselves submitted the Third Expert's Report into evidence even though the Third Expert expressly prepared the Third Expert's Report for this litigation. When a party in litigation *itself* prepares records in the regular course of business, the party implicates the reliability of the evidence. But nonparty contractors like the Third Expert or Petitioner's Mold Expert in fact prepare reports in the regular course of their business and bear a contemporaneous business duty to memorialize the work they do for their clients. [Cf. Chiu-Caranese v. DeMeo, 2 AD3d 766](#) (2nd Dept. 2003). Accordingly, Petitioner's Second Report is admissible.

[Return to Decision List](#)