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6211 BROADWAY REALTY v. O'NEILL

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: HOUSING PART S

-----X
6211 BROADWAY REALTY,

Petitioner,

Index No. L&T 58863/18

-against-

DECISION/ORDER

JENNIFER O'NEILL,

Respondent,

6211 Broadway
Apartment 5C
Bronx, New York, 10471,

Address.
-----X

BERNADETTE G. BLACK, J.:

BACKGROUND

Petitioner commenced this nonpayment proceeding to recover possession of the subject rent-stabilized premises, claiming rent arrears totaling \$4,469.11, for the rent that was due from September 2018 through November 2018 at \$1,131.42 per month, and a balance of \$1,074.85 for August 2018. Respondent interposed a *pro se* answer alleging a warranty of habitability defense and a general denial.

Respondent subsequently retained counsel, and interposed an amended answer detailing the warranty of habitability conditions, as well as a counterclaim for rent abatement. Specifically, respondent alleged the following conditions: mouse and roach infestation; cracked window and missing window glide in the master bedroom, and defective window frame in the kitchen; broken plaster in the kitchen, on the living room ceiling, and under the living room window; paint needed throughout the apartment and on the metal riser in the bathroom; splotches of paint on the floor of the second bedroom; defective electrical outlets in the kitchen, master bedroom, and living room;

defective light fixture in the master bedroom; missing doorknob in the second bedroom; damaged wooden floor tiles in the second bedroom, and broken and missing floor tiles in the bathroom; defective radiator in the second bedroom; broken wooden kitchen cabinet under the sink; defective kitchen stove. Respondent sought an abatement for these conditions. Respondent's answer noted that the Department of Housing Preservation and Development (hereinafter "HPD") placed numerous violations for conditions in the apartment since 2016.

Prior to trial, respondent consented to petitioner's prima facie case, and the trial proceeded on respondent's defenses and counterclaims only. The Court notes that respondent raised most of the same warranty of habitability conditions in a prior nonpayment proceeding, before a different Judge, under index number 069533/17, and a trial decision disposed of the parties' claims and awarded an abatement through June 30, 2018. As such, this court's inquiry as to the breach of warranty of habitability and abatement is limited to the period from July 2018 through September 2019.

FINDING OF FACTS

The court took judicial notice of violations placed by HPD at the subject premises. On July 2, 2018, HPD issued the following "B" violations: roach infestation; mice infestation; broken or defective electrical switch in the second bedroom; missing radiator valve cap in the second bedroom; broken or defective electrical outlet in the kitchen; inadequate electric service supply to ceiling fixtures in the second bedroom; broken or defective wood cabinet base in the kitchen; paint and plaster in the third room.

Approximately five months later, on December 31, 2018, HPD issued "B" violations for the following: mice infestation; broken or defective bedroom window glass; inadequate electric service supply to ceiling fixtures in the bedroom; defective electrical outlet in the kitchen; paint

and plaster in the kitchen; and "A" violations for defective kitchen window sash; defective electrical outlet in the bedroom; paint and plaster throughout the apartment; missing doorknob on the bedroom door; paint on the bathroom riser. In addition, on April 9, 2019, HPD issued a "C" violation for cockroach infestation at the subject premises.

Respondent testified as to the following conditions:

1) Master bedroom: broken latch and lock on the fire escape window;

2) Kitchen: malfunctioning stove, with particles in the stove catching on fire during cooking and stove missing screws; broken kitchen tiles; defective kitchen outlet; chipping and stained paint; window that would not stay open; broken and rotted kitchen cabinet. Respondent stated that she notified the landlord of the kitchen cabinet defect back in 2017. According to respondent, the superintendent came to the apartment and repaired the cabinet, but not the countertop which respondent stated had rotted and needed repair as well. Respondent testified that the kitchen cabinet was not repaired until March 2019, one month before HPD came to reinspect the apartment in April. Respondent notified the landlord of the kitchen window defect some time in 2017. Respondent testified that a properly functioning kitchen window is very important, as it facilitates ventilation and temperature control while cooking.

3) Children's bedroom: starting in around 2017, the doorknob to the children's bedroom was getting "stuck," locking the children inside the bedroom. The condition was repaired on or about March 2019. Respondent further testified that the radiator in her children's bedroom was malfunctioning and leaking water which caused damage to the floors and walls of the bedroom. The floor tiles in the children's bedroom were damaged, causing splinters to the children's feet. Respondent's children are ten, thirteen, sixteen, and twenty-one.

4) Bathroom: loose toilet bowl; defective radiator, and paint chipping on the riser. Respondent testified that she notified the landlord of the conditions in her bathroom around December 2018. Respondent also indicated she believed that the paint in the bathroom contains lead, however, respondent produced no HPD violations for lead or other proof of lead in the paint.

5) Living room: partially broken paint and plaster; evidence of leak on living room ceiling; and loose outlet in the wall. Respondent testified that she notified the landlord of these conditions some time during 2017.

6) Hallway leading from the entrance of the apartment to the living room: intermittently active ceiling leak, requiring respondent to use buckets to catch the flowing water when the leak was active; bubbling paint; falling plaster. Respondent testified that she notified the landlord of these conditions in December 2016, and that they were repaired in March 2019.

7) Throughout the apartment: roach and mice infestation. Respondent testified that the infestation was so extensive that she and her family could not leave food out on the table for any period of time without vermin getting into it. As previously noted, "B" violations for roach and mice throughout the apartment was placed by HPD on July 2, 2018, December 31, 2018, and in April 2019, HPD placed a "C" violation for roach infestation at the premises. Finally, respondent testified that the apartment had needed a paint job since approximately 2016.

Most of the conditions described emerged in 2016 and were not repaired until March 2019, months after this nonpayment proceeding was commenced. Respondent acknowledged that at the time of her testimony, only the roach infestation, a "C" violation remained unresolved.

On cross examination, respondent testified to text message communication between herself and the building's superintendent, setting up repair access dates in August, September, October and November of 2018. Respondent testified that on August 30, 2018 the superintendent came to

her apartment to repair the toilet, but could not perform the repair, allegedly because he needed to order a part for the flushing mechanism. On September 5, 2018, the superintendent came in again, but it became clear that the part ordered for the flushing mechanism was the wrong part, and no repairs were performed on that day. On November 5, 2018, the superintendent replaced one of the malfunctioning electrical outlets, and on November 9, 2018, petitioner replaced the kitchen cabinet. Thereafter the relationship between the superintendent and respondent became strained, as the superintendent reportedly kicked respondent's washing machine, used obscene language, and took her cleaning products from the home. Respondent testified that she notified the landlord of her issues with the superintendent and requested that the work in the bathroom be performed by a licensed plumber.

Respondent stated that she refused access to petitioner's agent attempting to perform repairs only once, when she refused to let the superintendent into her apartment in November of 2018 following the above incidents. Respondent explained that she feared for her safety due to the superintendent's previous behavior. Respondent disputed denying petitioner access for repairs at any other time, though she testified to rescheduling several access dates with petitioner due to her work schedule. Respondent also acknowledged that she informed petitioner she would paint the living room herself because of the mess left behind by petitioner's workers on prior access dates. In addition, respondent stated that the plumber performed repairs in her apartment some time in December 2018, and the remaining repairs were completed in March of 2019.

Respondent testified to the effect of the conditions on her and her family. Since 2016, she and her family experienced stress, anxiety, and disruption caused by these multiple conditions and petitioner's failure to repair them. In particular, the vermin infestation was so pervasive that it caused respondent's ten-year-old son severe anxiety which required therapy. Respondent was

distressed by the ongoing conflict with the building superintendent regarding the repairs. Respondent also stated that she had to take extensive time off from work and use her vacation days to deal with repair issues, as well as for court appearances. Respondent attested that she was compelled to commence an HP action because of petitioner's failure to address the conditions in her apartment.

Respondent presented testimony of Elvis Rosario, a paralegal from respondent's counsel's office who took photographs of the conditions in respondent's apartment. Mr. Rosario testified that he took photos of conditions and areas of the apartment which were indicated by respondent. The witness testified that while he did not observe active leaks in the apartment, he did observe water damage which indicated that there had been leaks in the past. The photos were admitted into evidence, and depict the following conditions: severely chipping paint and plaster on walls and ceiling, doorframes, the bathroom riser, and around an electric outlet; cracked wood floor tiles spattered with paint splashes; cracked plaster on kitchen and bathroom walls; cracked window glass; broken kitchen backsplash tiles; exposed lightbulbs/missing light fixture on the ceiling, and loose light switch panel; cracked bathroom floor tiles; cracked and peeling grout/caulking around the bathtub.

Petitioner's witness, managing agent Baki Celaj, testified that petitioner purchased the building in November 2016, and that he was familiar with the daily operation of the building ever since. Although it is undisputed that HPD placed violations for the conditions at the premises on July 2, 2018, and that there had been communications between petitioner's agents and respondent regarding repairs from August 2018 through November 2018, Mr. Celaj testified that he was informed of repair requests by respondent only two months before the date of his testimony in

September of 2019. The witness stated that he personally visited the apartment in March 2019, when the repairs were completed.

Mr. Celaj asserted that respondent was uncooperative when the landlord attempted to gain access to the premises to perform repairs. Petitioner introduced one letter requesting respondent arrange access for repairs, mailed to respondent by certified mail on January 9, 2019. The letter was subsequently returned with post office label “return to sender unclaimed unable to forward.” Petitioner presented no proof that respondent received the letter or knew of its existence and contents, or willfully refused to cooperate in arranging access for repairs. Petitioner then presented a printout of email correspondence from respondent’s counsel to petitioner’s counsel, between March 30, 2018, and April 3, 2018. In particular, the email from respondent’s counsel dated April 3, 2018 lists several conditions requiring repair in the apartment and stated that respondent “no longer wants any painting done, as the previous person that your client [sic] there left significant damages to the floor when he painted.”

APPLICABLE LAW

Real Property Law (“RPL”) § 235(b) defines warranty of habitability as an implied obligation to ensure the leased premises are “fit for human habitation and for the uses reasonably intended by the parties and that the occupants ... shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety.” *Id.* The warranty of habitability protects “against conditions that materially affect the health and safety of tenants or deficiencies that in the eyes of a reasonable person deprive the tenant of those essential functions which a residence is expected to provide.” *Solow v. Wellner*, 86 N.Y.2d 582, 588 (1995), quoting, *Park West Management v. Mitchell*, 47 N.Y.2d 316 (1979).

Where the court finds that breach of the warranty of habitability occurred, in violation of RPL § 235(b), the court may award damages in the form of a rent abatement and injunctive relief directing breach to be remedied. See Bartley v. Walentas, 78 A.D.2d 310 (1st Dept 1980). A number of factors play a role in determining the appropriate percentage of abatement, including severity of conditions, notice to the landlord, (see e.g., Nachajski v. Siwiec, 31 Misc. 3d 150(A) [App Term, 2nd Dept 2011]), duration of conditions, and effectiveness of the efforts by the landlord to remedy the conditions. 501 N.Y. LLC v. Anekwe, 14 Misc. 3d 129(A) (App Term, 2nd Dept 2006) (citing, Park West Management Corp. v. Mitchell, *supra*). When determining damages, the court measures “the difference between the fair market value of the premises if they had been as warranted, as measured by the rent reserved under the lease, and the value of the premises during the period of the breach.” Park West Management Corp. Id., at 329; See also Mateo v Anokwuru, 57 Misc. 3d 61 (App Term, 1st Dept 2017); Dani Lake LLC v Torres, 64 Misc. 3d 1231(A) (Civ Ct Bronx County 2019).

Courts have awarded a range of abatements for multiple or aggregate conditions, depending on their nature, severity, and duration. See, e.g., Pleasant East Associates v. Cabrera, 125 Misc. 2d 877 (Civ Ct NY County 1984) (35% rent abatement for recurring water leaks and rodent and cockroach infestation); Smith v. Maya, 1999 WL 1037917 (App Term, 2nd Dept 1999) (30% rent abatement for recurring leaks, broken windows and malfunctioning door lock); Kiss v. Castellanos, 43 Misc. 3d (Civ Ct, NY County 2014) (80% rent abatement for multiple conditions including collapsed ceiling and false certifications that violations had been corrected). In abatement cases focusing primarily on mouse and roach infestations, courts have awarded from five to fifteen percent abatement, to as much as forty percent abatement, depending on severity of the condition. See Hillside Place. LLC v Lewis, 29 Misc. 3d 139(A), (App Term 2nd Dept; see also 501 N.Y.

LLC v. Anekwe, supra. (upwardly modifying to 40% lower court's rent abatement for rat and cockroach infestations, and kitchen cabinets damaged as a result of unsuccessful extermination efforts).

ANALYSIS

The court credits respondent's testimony, and the documentary evidence submitted by respondent, including the violations placed by HPD for the conditions in the apartment, and finds that petitioner breached the warranty of habitability by failing to timely and properly repair multiple conditions throughout the subject premises. RPL§ 235(b); see also Park West Management Corp. v. Mitchell, supra. Petitioner did not present any credible evidence that respondent meaningfully denied petitioner access to perform the repairs. Nor did petitioner present anyone with first-hand knowledge of any repair attempts prior to March 2019, between three and eight months after HPD placed multiple violations for conditions found in the apartment, and more than one year after receiving notice of the conditions through an HP action commenced by respondent in January 2018, with a consent order between the parties on March 14, 2018.

The evidence adduced at trial supports a finding that since petitioner took ownership of the subject building in 2016, there have been multiple persistent conditions in need of repair throughout respondent's apartment. Relevant to this proceeding, from July 2018 to March 2019, HPD placed twenty (20) "A" and "B" violations for conditions at the premises. Furthermore, while it is undisputed that all but one repair condition was resolved in March 2019, the remaining issue, a pervasive roach infestation, has not been abated, and in fact escalated. While in July of 2018, HPD placed a "B" violation for roaches throughout the apartment, in April 2019 HPD inspected the apartment again and placed "C" violation for roach infestation, indicating a hazardous condition which should be addressed immediately.

Petitioner clearly had notice of these conditions, as HPD records show several repeat violations for the same conditions during this period, and respondent's credible testimony as to her interactions with the superintendent in August, September, October and November of 2018 evidences petitioner's knowledge of the repairs required in the apartment. Petitioner's argument that respondent is to blame for the persistence of these conditions due to her failure to provide access is unavailing. Petitioner presented no proof that respondent ever received the one letter produced to the court requesting respondent contact her landlord to arrange repairs, and in fact the letter was returned to petitioner by the post office label. Finally, the email correspondence between parties' counsel in March-April of 2018 does not absolve petitioner of its obligation to make repairs. Respondent's counsel's email clearly requests repair for a number of conditions, and states that respondent no longer wishes petitioner's workers to perform the painting due to the fact that the workers who did attempt this repair did such a poor job that it made the condition of the apartment worse, not better. None of these communications can be reasonably interpreted as respondent's unwillingness to arrange access with petitioner. Rather, it evidences an ongoing frustration with petitioner's failure to sufficiently address the long-standing problems in the apartment. Furthermore, petitioner does not show how this correspondence regarding repairs in March and April of 2018 hampered petitioner's ability to cure violations placed for the condition of the apartment in July and December of 2018, which are at issue in this proceeding.


The court finds that these ongoing conditions materially impaired the habitability of the subject premises, and awards respondent an abatement of 30% for the array of conditions that existed between July 2018 and March 2019. In addition, the court awards a 25% abatement for the pervasive and intensifying cockroach infestation from April 2019 through September 2019. On the final day of trial, the parties agreed that \$8,142.37 in rent was³ outstanding through

September 2019. Respondent is awarded a rent abatement in the amount of \$4,751.96. Petitioner is awarded a money judgment in the amount of \$3,390.41 for rent due through September 2019. The warrant may issue five days after service of a copy this order with notice of entry, if respondent has not satisfied the judgment. Petitioner is directed to abate the cockroach infestation and correct the "C" violation as required by law. This constitutes the decision and order of the court.

The parties may collect their exhibits from the part within the next 14 days.

Dated: Bronx, New York
November 22, 2019

SO ORDERED


HON. BERNADETTE G. BLACK
Bernadette G. Black, Judge
Civil Court, Housing Part