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

--x

AMSTERDAM I LLC,

Petitioner,

-against-

ROSA SANTOS,

Respondent.

PREMISES: 2014 Amsterdam Avenue, Apt. 4S
New York, New York 10032

--x

L&T INDEX No.: 67418/18

DECISION / ORDER

HON. TIMMIE ERIN ELSNER, J.H.C.

Recitation, as required by CPLR §2219(A), of the papers considered in the review of respondent's motion to hold the petitioner in contempt of court:

Papers	Numbered
Respondent's Order to Show Cause and Affidavit Annexed with Exhibit.....	1
Petitioner's Affirmation and Affidavit in Opposition with Exhibits.	2
Respondent's Replying Affirmation and Affidavit.......................................	3
Petitioner's Memorandum of Law in Opposition..	4
Respondent's Memorandum of Law in Support..	5

PROCEDURAL HISTORY

Amsterdam 1 LLC ("petitioner") commenced this nonpayment proceeding against the rent-stabilized, tenant of record, Rosa Santos ("respondent"), for 2014 Amsterdam Avenue, Apt. 4S, New York, N.Y. 10032 ("premises") at the monthly rate of $1,558.00 for April and May 2018. Respondent appeared *pro se* and interposed an answer, alleging that a portion of the rent had been paid and that petitioner failed to provide services and/or repair conditions in the premises.

The matter was initially scheduled for July 27, 2018 in Resolution Part H at which time respondent was referred for legal representation. Counsel appeared on Oct. 28, 2018. By stipulation, dated November 29, 2018, the parties agreed that "respondent's attorney sent petitioner's counsel a list of conditions alleged to exist in the apartment earlier this month along w[ith] proposed access dates. Respondent's counsel is waiting on confirmation of access dates." Ultimately, respondent's attorney moved to amend the answer to assert, among others, breach of warranty of habitability as

an affirmative defense and counterclaim. The proposed amended answer, sworn to January 22, 2019, specified conditions in the premises which respondent claimed were rent impairing including, but not limited to: mouse and roach infestation; a broken burner on the stove; and missing floor tiles. A court-ordered HPD inspection was conducted on March 28, 2019 and eleven violations were issued: one class "A"; eight class "B"; and two class "C". The class "C" violations required petitioner to "Abate the infestation consisting of roaches in the entire apartment ..." and "Abate infestation consisting of mice in the entire apartment..." The "B" violations included "Properly repair with similar material the broken or defective wood floor in the 4th room from east ..." and "Properly repair the broken or defective 2 stove burners not working in the kitchen..." The motion to amend was granted by order, dated April 25, 2019, and the matter was refer to Part N for trial.

On May 2, 2019, the parties appeared for a pretrial conference. In addition to the petitioner's attorney, David Tennenbaum appeared as petitioner's agent with authority to resolve the parties' claims and defenses. By so-ordered stipulation, dated May 2, 2019, the parties agreed to the following:

> 1. The parties agree that $14,123.12 is owed through and including 5/31/19.
> 2. The parties agree to an abatement of $1,013 in full satisfaction of all warranty of habitability claims to date.
> 3. Petitioner acknowledges receipt in open court today of DSS checks and money orders totaling $12,828.04 listed below . . . .
> 4. Balance of $282.08 to be paid in accordance with DSS direct vendor payments schedule but in any event on or before 5/31/19.
>
> * * *
>
> 6. Attached as Exhibit A is the HPD print out of outstanding violations fated 5/1/19. Any conditions not yet repaired are to be repaired by 5/31/19 as required by law.
>
> * * *
>
> 8. Petitioner alleges and respondent disputes that it has completed the majority of violations.

By Order to Show Cause, dated June 21, 2019, respondent sought relief including, but not limited to, issuance of an order "(i) punishing Amsterdam 1 LLC for civil contempt by fine, imprisonment, or both for their failure to comply with the stipulation so-ordered by the Hon. Timmie E. Elsner on May 2, 2019; (ii) awarding actual damages incurred as a result of petitioner's failure to comply with the orders of this Court. The respondent alleged four conditions had not been corrected including mice and roach infestation, which HPD had categorized as "C" violation, as well as a broken and defective floor in the 4th room and a broken stove burner. The respondent also claimed additional conditions had occurred since the May 2, 2019 stipulation. The motion was returnable July 2, 2019 and adjourned pursuant to a briefing schedule to July 30, 2019.

Through its attorney, petitioner submitted opposition to the order to show cause. The affirmation of Jordan J. Tapia notes that petitioner's agent, David Tennenbaum, was present in court when the stipulation was entered. It claims that, as evidenced by self-certification by petitioner, all violations have been removed save for an "administrative violation." Paragraph 18 of the affirmation states "Further, it should be noted that the violations that previously existed in the Respondent's apartment were the direct result of Respondent's own living conditions. Petitioner has even advised the Respondent on multiple occasions that she can request regular extermination services and she has failed to do so." (*See* Tapia Affidavit, July 16, 2019).

Petitioner's opposition was also supported by the affidavit of David Tennenbaum. Mr. Tennenbaum swore, under oath, that he is an agent for the petitioner and that there was no basis for the order to show cause as "all the alleged repairs have been completed and no violations currently appear for this unit on HPD's website except for one administrative violation." Mr. Tennenbaum failed to mention that the violations had been removed through petitioner's self-certification of completion rather than by HPD inspection. He asserted that he was present in court when the

stipulation of May 2, 2019 was entered and "[i]t should be noted that many of the repairs alleged were the result of Respondent's own living conditions. As an example, the alleged mice and roach issue is due to Respondent's repeated failure to keep the apartment clean." In response, respondent affirmed the conditions claimed in the underlying Order to Show Cause continued to exist.

As of July 30, 2019, HPD had not re-inspected the premises. Following argument of the order to show cause, the court granted respondent's application "to the extent of setting the matter down for a hearing" to determine whether petitioner complied with the terms of the settlement agreement of 5/2/19 and, if not, whether petitioner is in contempt of this court's order. As part of this hearing, the court may inspect the premises. In the event it does so, the results of the inspection will become part of the record with respect to the hearing. The attorneys for the parties may arrange for interim access for completion of repairs despite petitioner's position that they are complete." The court ordered: initial access dates of August 7 and 9, 2019; an HPD inspection for August 26, 2019 to give petitioner another opportunity to insure all conditions had been addressed; and adjourned the hearing to September11, 2019.

HEARING

On September 11, 2019, the parties appeared for a hearing relating to petitioner's alleged contempt. The court took judicial notice of the results of the HPD inspection of August 26, 2019 and noted that, in addition to approximately 15 new violations, three of the conditions, which were the subject of the contempt motion, were re-issued: a "C" violation for roach infestation; a "C" violation for mice infestation; and a "B" violation for the broken wood floor in the 4th room from east. The HPD inspector did not issue a violation for broken stove burners.

Petitioner continued to assert that the conditions in the premises were the result of respondent's poor housekeeping and lifestyle. Based on the forgoing, the court determined a visit to

the premises was in order. Petitioner objected, in part, because respondent would have time to clean the premises before the visit occurred. The court overruled the objection and conducted its inspection on September 18, 2019. It placed the results of its inspection on the record on September 20, 2019.

On September 18, 2019 the court arrived at the building at approximately 3:25 p.m. and waited approximately ten minutes for petitioner's attorneys and/or managing agent to arrive. When they did not appear, the court entered the building and proceeded to the premises. The building superintendent was present. The court observed that the hallway and lobby were dirty and that common area floors were patched with many different materials. Years of deferred maintenance were apparent. The court was met at the premises by respondent's attorney, an interpreter, respondent and numerous children. The apartment was clean and neat. There was no indication that it had been scrubbed to create a false impression for the court. No odor of cleaning fluid was present. It was readily apparent that the linoleum covering wood floors was completely worn and improperly patched in a way which formed a trip hazard as was evidenced by numerous violations placed by HPD. The court refrained from inspecting other new violations placed by HPD as they were not the subject of the hearing.

The first room entered was the kitchen. Although no new violation was placed for the condition of the stove, the court tested the burners. The ignition for one of the four burners sparked but did not ignite. Mouse droppings and evidence of infestation were present near the stove and sink despite the cleanliness of the kitchen. Most disturbing were roaches freely roaming throughout the apartment. The court observed many canisters of insecticide stored in the premises and that, despite the daylight hour, all the lights were turned on. Roaches were crawling on the floors and walls of the kitchen, bathroom, and bedrooms. The court observed children in the premises reacted to the roaches nonchalantly as if they were a common aspect of day-to-day life. The premises were sparsely

furnished in a way that did not encourage breeding or shelter for insects. Finally, the floor in the fourth room (child's bedroom) remained improperly patched. The linoleum was worn to the point where the wood floor beneath was apparent (thus, the violation for "repair defective wood floor").

After placing its findings on the record, the court suggested ways to cure the violations which were the subject of the hearing. It adjourned the matter for witness testimony and to provide petitioner additional time to address conditions and purge any potential contempt. The first witness petitioner called to refute respondent's claims was the respondent herself. On examination, the respondent admitted that petitioner had addressed most of the issues with the floor. They also put "poison" for roaches on the furniture throughout the kitchen, including inside the cabinets, where food was kept on October 2, 2019 and a subsequent date, had her sign a document and left. The treatment had no effect on the infestation.

Jorge Alejandro, the building superintendent, testified next. He stated that he is responsible for cleaning the building and performing routine maintenance. According to Mr. Alejandro, an exterminator visited the premises and utilized special liquid for treating the kitchen and bathroom. He was not present during the visit but was aware the respondent provided access. He was unaware of any long-term plan for curing the class "C" violations other than the routine sign-up for monthly extermination and his use of a spray.

Respondent took the stand again but this time on her own behalf. She testified that the last time the superintendent exterminated was in June 2019. In October, Mr. Alejandro replaced floors in the premises as well as a kitchen cabinet and the bathroom ceiling. The mouse and roach infestation continued and, if anything, were worse than ever. Respondent believed mice were entering through a hole in the bathroom. At times, they were seen in the beds and bed sheets, events clearly disturbing to the witness. She also testified that she awoke to find a roach in her ear one morning. Respondent

admitted she would not allow the superintendent to enter the premises without her being present. He always notified her prior to placing poison in the premises so she could protect the children from exposure. The court then adjourned the case for a re-inspection to determine whether the conditions were addressed and for submission of memorandum on a legal issue. The "C" violations for mice and roach infestations were re-issued as was the "B" violation for a defective floor in the 4th room. Based upon these violations, it was clear petitioner failed to purge any potential contempt.

LEGAL ANALYSIS

Civil contempt requires a determination that a lawful order of the court, clearly expressing an unequivocal mandate was in effect; a determination "with reasonable certainty" meaning proof by clear and convincing evidence that the contemnor disobeyed that order; that the contemnor knew of the Court's order, although it is not necessary that the order actually have been served upon the party. *See El-Dehdan v El-Dehdan*, 26 NY3d 19 [2015]; *see also, Matter of First Am. Tit. Ins. Co. v Cohen*, 163 AD3d 814 [2d Dept 2018]. It must also be shown that the disobedience defeats, impairs, impedes or prejudices the rights or remedies of a party. *See Board of Directors of Windsor Owners Corp. v Platt*, 148 AD3d 645 [1st Dept], *leave to appeal dismissed*, 30 NY3d [2017].

In this instance, the so-ordered May 2, 2019 stipulation expressed a clear and unequivocal mandate to correct violations. The court notes that Mr. Tennenbaum, who describes himself as a petitioner's agent, was present when the agreement was "so-ordered" by the court and was aware of its terms.

Respondent has shown that petitioner failed to obey the order of the court which directed correction of violations in the premises with respect to mouse infestation, roach infestation, and repair of a floor in the fourth room (child's bedroom) in the premises. Repeated violations were issued for these conditions on March 28, 2019, August 26, 2019, and October 29, 2019. The

existence of these violations, in and of themselves, evince prejudice to petitioner which supports a finding of contempt. *See Brown v 315 E. 69 St. Owner Corp*., 11 Misc3d 1069(A)[Civ Ct, NY Co. 2006], *citing, Various Tenants v N.Y.C. HPD*, 153 Misc2d 221 [App Term, 1st Dept 1992].

Petitioner's claims that the respondent contributed to the violations by failing to keep the premises clean are not only unsupported by the testimony of the sole witness appearing on petitioner's behalf who actually visited the premises, Jorge Alejandro, but also by the court's inspection on September 18, 2019.

The court finds petitioner not only in contempt of its order, dated May 2, 2019, but also orders of July 30, 2019, September 11, 2019, and September 20, 2019, which directed correction of the same conditions, two of these conditions are categorized by the City of New York as "immediately hazardous" seriously effecting the health, safety, and welfare of those in the premises. The court further notes that it repeatedly granted petitioner time to "purge" any contempt, even suggesting ways to address violations in findings issued on the record on September 20, 2019.

Clearly, the court is empowered to hold petitioner, a Limited Liability Corporation in civil contempt as the result of its failure to comply with court orders. It also finds David Tennenbaum, an agent of petitioner, in civil contempt. "Persons not parties who have knowledge of [a court order] may be bound by the [court order] providing they are in privity with a party, such as officers or agents or servants of a party acting in collusion with the party." *See Matter of Rothko*, 84 Misc2d 830 [Surrogate's Ct., NY Co. 1975], *modified on other grounds*, 56 AD2d 499 [1st Dept], *aff'd*, 43 NY2d 305 [1977]; *see also, McCain v Dinkins*, 84 NY2d 216 [1994](finding no basis "to absolve the individual agents of the City who performed or failed to perform the ordered acts, while holding the abstract principal, the City, responsible and in contempt for the very same failure to comply. The individual defendants were sufficiently aware of the prior orders...the prior contempt

proceedings, and the unacceptable and unauthorized circumstances and conditions surrounding the use of the EAUs. The City and the individual contemnors had adequate and sufficient notice of decrees and the contempt proceedings against them for their individualized responsibility and noncompliance.”). Thus, if the landlord is a corporation, “an officer...responsible for its affairs and its disobedience may ne held liable for the corporation’s contempt.” *N.Y.C. Dep’t of Hous. Pres. & Dev. v B.B. Am Holding, Inc., NYLJ*, June 22, 1985, p.28, col. 4 [App Term, 1st Dept] *citing, Citibank v Anthony Lincoln-Mercury*, 86 AD2d 828 [1st Dept 1982]; *see also, Johnson v Atop Roofing & Siding Corp.*, 135 Misc2d 746 [Civ Ct, Kings Co. 1987].

In contrast to criminal contempt, which requires greater procedural protections, “civil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard.” *See International Union, United Mine Workers of America v Bagwell*, 512 US 821, 114 S.Ct. 2552 [1994]. “Because civil contempt sanctions are viewed as non-punitive and avoidable, fewer procedural protections for such sanctions have been required.” *Id. at* 831; see *N.Y.C. HPD v B.B. Am Holding, Inc., supra* (vacating the criminal contempt penalty against the corporation’s president because he was not personally served with the contempt papers, but affirming the sanction for civil contempt against him).

In this instance, respondent was not required to name or serve David Tennenbaum individually with a copy of the order which forms a basis for the relief requested or with a copy of the order to show cause seeking a finding of civil contempt. Mr. Tennenbaum had notice of the court’s order of May 2, 2019 as well as the order to show cause seeking contempt penalties including fine, imprisonment, and an award of actual damages incurred for failure to comply with

the court's order. By holding himself out as petitioner's agent, the person responsible for insuring compliance, he stands in *pari delicto* for purposes of civil contempt.

New York Law permits the party in contempt to purge the contempt by performing the act required, or by undoing or reversing the acts constituting the contempt. *See Matter of Silverstein v Aldrich*, 76 AD2d 911 [2d Dept 1980]; *see also, Dankner v Steefel*, 41 AD3d 526 [2d Dept 2007] (court should have provided opportunity to purge contempt); *Matter of Pronti v Allen*, 13 AD3d 1034 [3d Dept 2004] ("contemnor generally allowed an opportunity to purge the contempt by performing the act required...").

In this instance both petitioner and David Tennenbaum, as its agent, have been granted ample opportunities to purge their contempt. The court extended the time period to correct violations on July 30, 2019, September 11, 2019, and September 20, 2019. After completion of testimony on October 22, 2019, a final HPD inspection was ordered by the court to ascertain whether violations were corrected. Petitioner, rather than ensuring compliance, continued with blind assertions of fault on the respondent's part and made no attempt to correct violations.

As set forth in New York Judiciary Law Section 774(1) which governs the length of imprisonment following a finding of civil contempt, "where the misconduct proved consists of an omission to perform an act or duty, which is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it..." These penalties were enacted by the legislature in furtherance of the purpose of Civil Contempt sanctions which are designed to compel future compliance with court orders and are considered to be coercive and avoidable through obedience. *See International Union, United Mineworkers of America v Bagwell, supra*. Pursuant to New York Judiciary Law Section 772, "Upon the return of an application to punish for contempt, the questions which arise must be determined, as upon any other motion; and, if the determination is to

the effect specified in section seven hundred and seventy, the order thereupon must be to the same effect as the final order therein prescribed. Except as hereinafter provided, the offender may be committed upon a certified copy of the order so made, without further process. . . ."

CONCLUSION

The court finds that both petitioner and its agent, David Tennenbaum, in contempt of the Court's order of May 2, 2019. It is undisputed that they were aware of the order, continue to disobey that order despite multiple opportunities to comply, and that respondent has been harmed by said disobedience. Petitioner and its agent are granted ten days from service of a copy of this order with notice of entry to purge their contempt by curing the class "C" violations in the premises for mouse and roach infestation, as well as the class "B" violation mandating repair of the floor in the fourth room (child's bedroom). Respondent is to provide access to petitioner and its agents as arranged by her attorneys during the ten-day period set forth herein. Petitioner and David Tennenbaum are to appear personally in court on February 5, 2020 at 9:30 a.m. with proof that the violations have been corrected and a plan to address the infestations going forward.

This constitutes a Final Order and the date set forth herein for compliance is deemed a return date for the motion for contempt. A default in appearance or failure to purge the order of contempt may result in the issuance of a warrant for arrest and order of commitment as well as civil penalties.

The balance of the motion which seeks monetary damages on behalf of respondent is granted to the extent of restoring the matter to the calendar on February 5, 2020 at 9:30 a.m. to select a hearing date to determine the extent of damages sustained by respondent and/or the appropriate fine.

This constitutes the order and decision of the court.

Dated: New York, New York December 31, 2019__________TIMMIE ERIN ELSNER, J.H.C.