2020-01-23

West 30th Realty LLC v. Castaldo

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

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WEST 30th REALTY LLC,

Petitioner,

Index No. 58883/2014

- against -

DECISION/ORDER

MICHAEL CASTALDO,

Respondent.

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WEST 30th REALTY LLC,

Petitioner,

Index No. 52969/2015

- against -

DECISION/ORDER

BOZENA CASTALDO,

Respondent.

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Present: Hon. Jack Stoller
Judge, Housing Court

West 30th Realty LLC, the petitioner in both of these proceedings ("Petitioner"), commenced these proceeding against Michael Castaldo ("Respondent"), a respondent in one of the proceedings, and Bozena Castaldo ("Co-Respondent"), a respondent in the other proceeding (collectively, "Respondents"), seeking money judgments and possession of, respectively, 308-312 West 30th Street, Apt. 2A, New York, New York ("Apt. 2A"), and 308-312 West 30th Street, Apt. 2B, New York, New York ("Apt. 2B")(collectively, "the subject premises"), on the basis of nonpayment of rent. Respondents interposed an answer with affirmative defenses and counterclaims by an answer served on April 4, 2014. The subject premises were apparently combined at some point in the past and Respondents are married to one another. Nevertheless,

the parties denoted the two apartments separately. Be that as it may, the Court held a joint trial of these two proceedings on October 18, 2017, December 14, 2017, April 26, 2018, October 18, 2018, March 21, 2019, April 10, 2019, June 12, 2019, June 20, 2019, October 30, 2019, November 4, 2019, November 7, 2019, and January 31, 2020.

Petitioner's case

Petitioner proved that it is the proper party to commence these proceedings; that there are landlord/tenant relationships between Petitioner and Respondents; that Respondents' tenancies are subject to the Rent Stabilization Law; that Petitioner has complied with the registration requirements of 9 N.Y.C.R.R. §2528.3 and MDL §325; that Respondents owed rent arrears; and that Petitioner properly demanded payment of rent pursuant to RPAPL §711(2).

Respondent's case

Before the trial, the Court had determined a motion deeming that Respondents' counterclaims to have accrued in April of 2008, six years before the interposition of Respondents' answers. As the unrebutted testimony of Respondents stated that the two apartments have been combined into one unit, the Court finds that Respondent's interposition of the answer confers the same defense at the same time as Co-Respondent's defenses.

Construction

Co-Respondent testified that there was scaffolding outside the windows of the subject premises from August of 2012 through May of 2013; that the scaffolding deprived the subject premises of light; that she could not use her air conditioner in the summer because of the scaffolding; and that contractors walked on the scaffolding right outside of her window starting at 8 a.m., depriving her of privacy. Co-Respondent testified on cross-examination that, in one

photograph of a dusty floor, the dust was only from footprints and not the rest of the floor and that she leaves her blinds closed when the scaffolding is up because she doesn't know whether or not a worker will be there when she wakes up.

Respondent testified that the construction incurred noise from August of 2012 through the end of June, in particular jackhammering, that he could hear inside the subject premises; that construction in the building in which the subject premises is located ("the Building") until February of 2016 incurred noise as well, particularly a renovation of three apartments on the same floor as the subject premises and on the floor above it; that the construction also caused a dust condition throughout the Building, with dust caked onto the common area floors and the elevators that found its way into the subject premises; that the construction caused debris to land on Respondent's air conditioner; that Respondent was concerned that dust would come into the subject premises if he turned the air conditioner on; that a renovation in Apartment 1A of the Building lasted from July of 2014 through February of 2016; that a renovation of Apartments 2C, 2D, 2F, and some apartments on the third floor of the Building lasted from August 2012 through mid-June or July of 2014; that a renovation of Apartment 3B lasted from mid-January of 2019 through June of 2019; that scaffolding didn't block all of their windows, just the ones facing west 30th Street; that the windows facing back were not covered; that the scaffolding came up in August of 2012 and remained up for three or four years; that it came back up again from December of 2018 through June of 2019; and that they had to keep shades drawn for privacy, which deprived them of natural light.

The tenant of Apartment 1C of the Building testified that she heard horrendously loud construction noise in 2012 or 2013; that construction led to a lot of dust in the Building; that

workers left the front doors of the Building open; and that the noise lasted for two weeks. The tenant of Apartment 4C of the Building testified that, between 2011 and 2014, he heard intermittent noise from construction and that his apartment experienced constant dust from 2012 through 2014, although it abated when the construction moved to a different floor. The tenant of Apartment 10D of the Building testified that construction went on at the Building for two, three, or four years; that she heard a lot of construction noise above her; that there was dust in the elevators that tracked throughout the Building; and that the entrance to the Building is sometimes unattended. The tenant of Apartment 4D of the Building testified that, in 2012 and 2013, two times a week, the drilling incidental to the construction was so loud and so hard that her couch vibrated; that when she opened the door to her apartment, there was a swish of talcum-like dust; and that the front door of the Building was not secure. The tenant of Apartment 8D of the Building testified that from 2012 to 2016, during construction, there was a tremendous amount of white dust almost daily on her floor and in entrance ways that ended up getting tracked into her apartment; and that during construction, the entrance door to the Building was left open a lot.

Respondents introduced into evidence photographs taken on March 23, 2013 and February 7, 2019 of scaffolding around the Building, including scaffolding right outside the window of the subject premises; of dust on a rug; photographs dated March 31, 2015 of furniture covered with a thick film a dust; photographs of the door to the Building being left ajar, on April 13, 2014, May 29, 2014, June 2, 2014, June 16, 2014, June 25, 2014, July 25, 2014, January 9, 2015, July 18, 2017, and August 8, 2017; a photograph dated July 20, 2018 of the dirt that had collected in the blinds in the subject premises that Co-Respondent had washed in the sink; photographs of dust and dusty footprints in the common areas of the Building, including a

staircase, the lobby, and a hallway from the apartment next to the subject premises; a photograph taken February 15, 2019 showing dust on a desk in the subject premises; and photographs of an air conditioner with debris on it.

Respondent introduced into evidence recordings of the noise that he experienced from the construction. Respondents introduced into evidence wipes that had dust on them from the construction after they cleaned the top of the air conditioner and furniture, on August 11, 2013, February 2, 2016, and March 11, 2016.

Respondents introduced into evidence records of applications for permits that Petitioner caused to be filed with the New York City Department of Buildings ("DOB") for, *inter alia*, construction permits, construction of a sidewalk shed, the installation of gas piping throughout the Building. A number of these applications, including the applications dated February 28, 2013, September 13, 2013, February 27, 2014, November 5, 2014, and August 6, 2015, state that no tenants are in occupancy of the Building.

Respondents introduced into evidence a letter to Petitioner dated March 15, 2014 expressing concern about construction in the Building, to wit, the noise, dust and debris and the unavailability of the bicycle room. Respondents introduced into evidence emails to Petitioner, one from March of 2013 complaining about noise, security issues, and dust resulting from the construction, and one from July of 2013 complaining about contractors leaving a front door open. Respondent testified that he told Petitioner about the negative effects of the construction multiple times, including by letters dated in March of 2015 and March of 2018, by verbally complaining to the super, and by emails. Petitioner's rebuttal witnesses, the property manager and the executive manager, did not rebut the evidence of notice.

On rebuttal, a contractor ("the Contractor") testified that his company renovated apartments in the Building; that his practice is to use protective measures that amount to a containment field to keep dust in the apartment he renovates; that the containment field entails plastic covering; that he does constant cleaning during work in occupied buildings; that he had a cleaning crew consisting of five people who mop and clean hallways, ledgers, and railings, and throw out garbage; that noise is limited to scope of work, although jackhammers can make a problem; that he can't do demolition without making noise; that he limits work hours from 9:00 a.m. to 5:00 p.m. even though the permit allowed earlier work; that electrical work causes noise; and that there was a tenant protection plan in place that he complied with. The Contractor testified on cross-examination that he had no specific memory of being in a specific apartment on a specific date at a specific time.

The extensive — some might even say protracted — testimony of nine witnesses, including seven non-party witnesses, of the conditions that construction in the Building visited upon Respondents, the numerous photographs, the real evidence, and the recordings of noise outweigh the testimony on Petitioner's rebuttal case and prove well beyond a preponderance of the evidence that Respondents lived with conditions that impaired the habitability of the subject premises. Respondents proved that scaffolding blocked light and air from windows on one side of the subject premises starting in August of 2012 which Petitioner, as the entity that effectuated the construction of the scaffolding, had notice of.

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

habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. Real Property Law §235-b(1). The measure of damages for breach of the warranty of habitability is the difference between the rent reserved under the lease and the value of the premises during the period of the breach. Park West Management Corp. v. Mitchell, 47 N.Y.2d 316, 329, *cert. denied*, 444 U.S. 992 (1979), Elkman v. Southgate Owners Corp., 233 A.D.2d 104, 105 (1st Dept. 1996). The Court finds that the reduction in light and air from one side of the subject premises and the implications for Respondents' privacy diminished the habitability of the subject premises by seven percent from August of 2012 through February of 2013 and again in December of 2018.[1]

Respondents proved that they gave Petitioner notice of the rest of the conditions that the construction occasioned as of March of 2013, conditions which lasted until February of 2016 and then recurred from mid-January of 2019 through June of 2019.

While Petitioner argues that construction is a reality of New York City living, such a reality does not gainsay the negative effect that construction can have on the habitability of an apartment. Construction and renovation work that incurs "noise, vibrations, and dust caused by jackhammering and other daytime construction activities" can diminish the habitability of an apartment by 25 percent. Itskov v. Rosenblum, 7 Misc.3d 135(A)(App. Term 1st Dept. 2005). Even in a commercial space, which RPL §235-b does not apply to, construction and its effects, such as noise, dust, and debris, can cause partial actual eviction. 81 Franklin Co. v. Ginaccini,

[1] Even though the parties treated Apt. 2A and Apt. 2B as separate apartments in some ways, the dimunition of their habitability was the same.

160 A.D.2d 558, 558-59 (1st Dept. 1990). See Also 360 W. 51st St. v. Cornell, 2005 N.Y.L.J. LEXIS 4167, *19 (Civ. Ct. N.Y. Co.), *citing* 106 East 19th Associates v. Berg-Meunch, N.Y.L.J. July 3, 2001 at 21:5 (App. Term 1st Dept.)(courts have long recognized construction dust as a condition which violates the warranty of habitability).

While the above authority awards a rent abatement of 25 percent for the effects of construction, this case presents an aggravating factor. An applicant for a construction permit must certify whether anyone occupies a building to be altered, constructed or demolished. N.Y.C. Admin. Code §28-104.8.2(1). If a unit is occupied during the construction, the applicant for a permit must submit a tenant protection plan describing in sufficient detail, *inter alia*, the means and methods to be employed to safeguard the safety and health of the occupants generally, and to control dust, pest control, and noise specifically. N.Y.C. Admin. Code §28-104.8.4. See Also N.Y.C. Admin. Code §BC3303.10. A number of applications for construction permits incorrectly represented to DOB that the Building was not occupied during construction, thus easing the way for Petitioner to engage in a scale of work disruptive to the habitability of the subject premises, particularly in terms of noise, dust, and disruption of services amply documented by the extensive record adduced at trial. The Court therefore finds that the manifold effects of the construction diminished the habitability of the subject premises by 40 percent from March of 2013 through February of 2016 and from mid-January of 2019 through June of 2019.

Elevator

Co-Respondent testified that there were many days that there are two elevators in the Building; that the one elevator that went to the basement was out of service because the contractor was using it; that she talked to Petitioner and the super about that; that both elevators

were inoperative about ten or eleven times; that she was late to work because of the elevator, as it took her half an hour to get out of the basement; that there is a laundry room and garbage disposal in the basement; and that the area she has to traverse when the elevator is broken is treacherous. Co-Respondent testified on cross-examination that she only uses elevators for laundry, garbage and recycling and that it was a hardship for her to walk down the stairs to the basement because she didn't know what she was breathing in.

Respondents introduced into evidence a photograph of a staircase leading to the basement.

The photograph does not depict a condition that warrants a rent abatement. As the Building has two elevators and as Respondents live on the second floor, the connection between disruptions in service of one of the elevators and habitability is not readily apparent. Respondents assert that the elevator that was out serviced the basement, which they used for laundry, recycling, and garbage, but they could access the basement by stairs. Respondent's complaints about the condition of the stairs to the room where they threw out garbage and recycling does not bear a strong enough connection to the use of the subject premises to warrant a rent abatement.

Gas

The tenant of Apartment 4C of the Building testified that he did not have gas for seven months in 2014. The tenant of Apartment 10D of the Building testified that she did not have gas for six months. The tenant of Apartment 4D of the Building testified that gas had to be turned off in the Building from April until October of 2016. The tenant of Apartment 8D of the Building testified that the gas was turned off in the Building for six months. The tenant of

Apartment 1C of the Building testified that the Building did not have gas from April until the end of October of 2016.

Respondents introduced into evidence notices from Petitioner dated April 11, 2016 and April 29, 2016 stating that gas would be cut off. Co-Respondent testified that there was no cooking gas service to the subject premises from April 3, 2016 to November 28, 2016; that she frequently prepares food at home; and that Petitioner provided them with hot plates.

Respondents introduced into evidence a letter dated March 15, 2014 they sent Petitioner complaining about the gas.

The preponderance of the evidence shows that the subject premises lacked cooking gas from April through October of 2016, a condition that warrants a rent abatement of 15 percent. See B-U Realty Corp. v. Kiebert-Boss, 50 Misc.3d 1220(A)(Civ. Ct. N.Y. Co. 2016).

Heat and hot water

Respondent testified that the heat in the subject premises was often inadequate but could also be so excessive as to be unbearable, to the point that he would use the air conditioner in the subject premises in the wintertime. Respondent introduced into evidence a heat log he maintained from April of 2009 through April of 2014. The heat log records temperatures lower than legally permitted by N.Y.C. Admin. Code §27-2029(a) in 2009 on April 7, May 1, October 6, November 12, and December 24; in 2010 on January 17, February 14, March 10, April 2, May 2, October 2, November 14, and December 23, in 2011 on January 19, February 12, March 16, April 9, May 2, October 5, November 8, and December 7, in 2012 on January 12, February 7, March 12, April 4, and May 1, on January 1, 2013 and in 2014 on January 5 and February 1. The heat log records excessive heat in 2009 on April 2 and May 4; in 2010 on April 3 and May 4; in

2011 on March 1, April 2, and May 1; in 2012 on April 1, October 2, November 3, and December 4; in 2013 on January 7, February 6, March 10, April 6, October 1, November 7, and December 25; and in 2014 on January 6, February 5, March 7, and April 4.

Co-Respondent testified that water pressure is fine now but that there were times when they had very low water pressure; that, from 6 p.m. until 9 a.m. the following day it was impossible to shower or wash; that the problem lasted for two years, but she did not remember the dates; that there was scalding hot water for a time; and that water was shut off four to five times since October of 2018. Respondent testified that he needed hot water from 12 midnight to 6 a.m. at varied times; that, for some years and some months he could not get hot water either every day or three times a week; that there was no water in 2019 on multiple days.

The tenant of Apartment 1C of the Building testified that heat and hot water were inconsistent, with the hot water alternating between nonexistent and dangerously scalding; that sometimes she had no heat; that the heat problem started in 2012; and that the problem was worst from 2012 to 2016. The tenant of Apartment 4C of the Building testified that there were intermittent problems with hot water on nights and weekends once the construction started; that the heat problem was not so bad for him; that the problems lasted from 2011 through 2014; that he had problems with heat once to three times in 2011 and hot water problems a couple of times per month in 2011, twelve times a year in 2011, and the same rate in 2012 and 2013. The tenant of Apartment 10D of the Building testified that it takes her a long time to get hot water; and that heat has not been a problem. The tenant of Apartment 4D of the Building testified that she had diminished heat and hot water from 2012 through 2014. The tenant of Apartment 8D of the Building testified that she gets too much heat; that it is boiling sometimes; that her hot water is

fine. Another tenant of Apartment 1C of the Building testified that her apartment, was oppressively overheated and that she had no problem with hot water.

Respondents introduced into evidence a letter dated March 15, 2014 they sent to Petitioner complaining about heat. Respondent testified that he complained to management about the heat situation by email; that he complained to super; and that he talked to Petitioner's management. Respondents introduced into evidence an agenda of a meeting that took place between Petitioner and a group of tenants at the Building that took place on April 16, 2018 where the tenant complained about the heat. Petitioner's rebuttal witnesses, the property manager and the executive manager, did not rebut the evidence of notice.

Respondents introduced into evidence a notice from Petitioner stating that water would be shut off, dated February 5, 2019. Respondents introduced into evidence a hazardous violation of the New York City Housing Maintenance Code placed by the Department of Housing Preservation and Development of the City of New York ("HPD") for scalding hot water in the bathroom.

All of the 29 days that Respondent's log recorded inadequate heat pre-dated the notice Respondents sent Petitioner on March 15, 2014, and only one of the days that Respondent's log recorded excessive heat post-dated such notice. Moreover, HPD never placed a heat-related violation on the subject premises. While such a failure to place a violation does not preclude Respondents from proving inadequate (or excessive) heat, Respondents may not avail themselves of the notice that a violation would impart to Petitioner for rent abatement purposes. Without such notice, the Court cannot award an abatement for this condition. Matter of Moskowitz v. Jorden, 27 A.D.3d 305, 306 (1st Dept.), *appeal dismissed*, 7 N.Y.3d 783 (2006), 1050 Tenants

Corp. v. Lapidus, 16 Misc.3d 70, 72 (App. Term 1st Dept. 2007).

As a rent abatement is based upon the monthly rent, and as the monthly rent differed at different times in the subject premises, the Court cannot award a rent abatement without clarity as to the dates at issue. Respondents did not prove by a preponderance of the evidence what dates the water service was not provided.

Intercom

Co-Respondent testified that the doorbell was fixed in September of 2018 after not having worked for several years. Respondent testified that, from 2013 to the date of his testimony, the intercom does not work properly, such that he gets buzzed for other apartments in the Building and they get buzzed for the subject premises. Respondent introduced into evidence videos of an intercom that is buzzing in a disturbing manner.

The tenant of Apartment 1C of the Building testified that the intercom system in the Building wasn't working. The tenant of Apartment 4C of the Building testified that intercoms have not worked since 2011 and as of the date of his testimony only works faintly. The tenant of Apartment 10D of the Building testified that the intercom did not work from 2012 until 2014 or 2015. The tenant of Apartment 4D of the Building testified that her intercom has never worked well. Another tenant of Apartment 1C of the Building testified that the intercom system was at times not working.

Petitioner introduced into evidence an order dated April 17, 2015 that the New York State Division of Housing and Community Renewal ("DHCR") issued resolving a complaint seeking a rent reduction order pursuant to 9 N.Y.C.R.R. §2523.4. The order denied a rent reduction order for, *inter alia*, a complaint about an intercom as a result of an inspection dated January 16, 2015

that found that the intercom was maintained.

The doctrine of collateral estoppel prevents a party from relitigating an identical issue decided against that party in a prior adjudication, ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d 208, 226 (2011), when the party had a full and fair opportunity to litigate the issue. Matter of Dunn, 24 N.Y.3d 699, 704 (2015). DHCR's determination that Petitioner maintained the intercom is preclusive on the Court through at lease the date of DHCR's inspection on January 16, 2015. The evidence of the operation of the intercom after that date is mixed; Co-Respondent testified that Petitioner did not fix the intercom until 2018, but one of the non-party witnesses testified that the intercom was fixed in 2015. On this record, the preponderance of the evidence does not support the proposition that the state of the intercom diminished the habitability of the subject premises.

Leaks/plumbing

Co-Respondent testified that leaks occurred while they weren't in the subject premises; that one time they were about to leave and water started coming down; that water backed up and came out of plumbing appliances in the subject premises a total of fifty times from 2008 to the date of her testimony; that they had to move a refrigerator because of a flood; and that they had to move a stove because water was behind it. Co-Respondent testified on cross-examination that the first day there was dirty water in the toilet was on July 17, 2013; that she did not know how many times after that the toilet looked like that; that she spoke to super about the condition; that she doesn't remember when it was corrected; that the bathroom ceiling looked like it did in the photographs from 2011 through 2015; and that it eventually took Petitioner one day to fix the ceiling. Respondent testified that the subject premises had multiple leaks and floods and that his

tub was constantly leaking. Respondent testified that the leak was fixed by mid-June of 2019.

Co-Respondent testified that she informed the super and Petitioner about the condition in 2011. Respondent testified that he complained about leaking to the super and Petitioner from 2008 through 2015.

Respondents introduced into evidence a recording dated May 29, 2019 of a tub with a leak that is dripping audibly. Respondents introduced into evidence photographs taken July 17, 2013 of a toilet bowl with water that is discolored; photographs taken March 11, 2015, March 16, 2015, March 26, 2015, and June 13, 2015 of leak damage, to wit, paint deteriorating, in the subject premises, including a bathroom ceiling, a bathroom wall, a living room wall with deteriorated plaster, and a photograph taken March 16, 2015 of a tub with shards of plaster in it.

While the preponderance of the evidence, particularly the testimony and the photographs, prove that a leak and damage from the leak occurred in the subject premises, the testimony between the two Respondents is inconsistent as to the beginning of the leak; one testified that it was 2008 and the other testified that it was 2011. The preponderance of the evidence shows that a leak started in 2011, although it is not clear what month. The evidence was also ambiguous as to the extent of the leak damage after June of 2015. The leak and the leak damage diminished the habitability of the subject premises by 12 percent, and the Court awards a rent abatement in that amount from December of 2011 through June of 2015.

Vermin

Co-Respondent testified that, starting in August of 2012 and through November of 2014 she saw mice in the subject premises sometimes once a week and sometimes seven to ten times a week and waterbugs three to four times a week; that she spoke to the super about the mouse

infestation; that the mice ate dog food that she had put out for her dog; that she observed mouse droppings in the subject premises; and that she signed up for extermination once a week. Respondent testified that he saw mice from August of 2012 through June of 2019, during the time of construction; that he asked the exterminator for additional glue traps; that he frequently caught mice on the glue traps; that he always gave access to the exterminator; and that if they went away for a weekend, they would come back and see bags of food having been chewed.

The tenant of Apartment 1C of the Building testified that once the construction started in 2012 she roaches, waterbugs, and mice. The tenant of Apartment 4C of the Building testified that he doesn't have a vermin because he takes care of it; and that he sees mice sometimes. Another tenant of Apartment 1C of the Building testified that she had issues with vermin, seeing rats in 2017 and 2018.

Respondents introduced into evidence photos of mice and waterbugs and roaches in the subject premises and in the hallway of second floor of the Building, from July of 2013, May, June, July, and October of 2014, August and September of 2015, and June of 2018.

Respondents introduced into evidence a letter they sent to Petitioner dated March 15, 2014 complaining about vermin and an email thread regarding extermination dated from May 8, 2014 through May 19, 2014. Respondents introduced into evidence an agenda of a meeting that took place between Petitioner and a group of tenants at the Building that took place on April 16, 2018 where the tenant complained about the extermination. Petitioner's rebuttal witnesses, the property manager and the executive manager, did not rebut the evidence of notice.

The testimony and photographs and undisputed evidence of construction in the Building prove by a preponderance of the evidence that vermin were present in the subject premises from

August of 2012 through September of 2015. While Respondent testified that vermin persisted in the subject premises through 2019, Co-Respondent's testimony was not consistent with that proposition. The presence of vermin diminished the habitability of the subject premises by 8 percent from August of 2012 through September of 2015.

Water in basement

Respondents introduced into evidence photographs taken in June of 2016 of a flooded basement. Respondent testified that the flooding in basement affects him because he has to go to the basement to do laundry and he has allergies. The tenant of Apartment 1C of the Building testified that there was water in the basement over several days. The tenant of Apartment 4C of the Building testified that there were floods in the basement on numerous occasions. The tenant of Apartment 10D of the Building testified that there was water in basement. The tenant of Apartment 4D of the Building testified that there were puddles of water in the basement.

Respondent's complaints about water in the basement of the Building do not bear a strong enough connection to the use of the subject premises to warrant a rent abatement.

Rent, arrears, and the amount of an abatement

A cause of action for nonpayment of rent sounds in contract. Solow v. Wellner, 86 N.Y.2d 582, 589-90 (1995), Rutland Rd. Assoc., L.P. v. Grier, 2017 N.Y. Misc. LEXIS 1025 (App. Term 2nd, 11th, and 13th Dists. 2017), Underhill Ave. Realty, LLC v. Ramos, 49 Misc.3d 155(A)(App. Term 2nd Dept. 2015), Fasal v. La Villa, 2 Misc.3d 137(A)(App. Term 1st Dept. 2004), Fucile v. LCR Dev., Ltd., 2011 N.Y. Slip Op. 32256(U)(Dist. Ct. Nassau Co.). Accordingly, in order to establish its prima facie case for a judgment, Petitioner bears the burden of proving, at trial, the existence of a contract between itself and Respondents to pay the rent

demanded. 402 Nostrand Ave. Corp. v. Smith, 19 Misc.3d 44, 46 (App. Term 2nd Dept. 2008).

The only lease in evidence for Apt. 2A is a one-year lease commencing April 1, 2016 and the only lease in evidence for Apt. 2B is a one-year lease commencing August 1, 2016. However, a price term may be sufficiently definite if the amount can be determined objectively without the need for new expressions by the parties, such as by reference to an extrinsic event, commercial practice, or trade usage. St. Louis & Westervelt v. Giulini, 176 Misc.2d 99, 100 (App. Term 1st Dept. 1998). Cf. Abady v. Interco, Inc., 76 A.D.2d 466, 474 (1st Dept. 1980). In the context of a landlord/tenant relationship, a repeated payment of the same monthly amount over time can be proof of an agreed-upon rental amount. Gordon v. Baez, N.Y.L.J. Jan. 10, 2002 at 28:5 (App. Term 2nd Dept.).

Petitioner introduced into evidence rent histories for both Apt. 2A and Apt. 2B. The rent history for Apt. 2A shows that Respondent paid $1,237.43 three times from January of 2010 through March of 2010; $1,308.13 twenty-four times from April of 2010 through March of 2012; and $1,339.65 fourteen times from April of 2012 through March of 2014. The Court finds that these amounts paid were the monthly rent for those time frames.

While there is no such pattern of consistent payments from April of 2014 through March of 2016, Respondent's one-year renewal lease for Apt. 2A, commencing on April 1, 2016, has a one-year renewal rate based upon a base rent of $1,443.47, which is also the rate that increases are based on. Under N.Y.C. Admin. Code §26-510(b), the Rent Guidelines Board ("RGB") establishes rent adjustments for the units subject to Rent Stabilization. The Court can take notice of the RGB guidelines. See, e.g., Curry v. Battistotti, 5 Misc.3d 1012(A)(Civ. Ct. N.Y. Co. 2004). The adjustment for a one-year renewal lease commencing April 1, 2016 is zero percent.

RGB Order 47. Petitioner's charge of $1,443.47 for both the rent prior to April 1, 2016 and the base rent for the lease commencing on April 1, 2016 is therefore consistent and the preponderance of the evidence shows that this was Respondent's rent from April of 2014 through March of 2016. The lease in evidence shows an additional charge rendering the rent for Apt. 2A to be $1,527.14 from April of 2016 through March of 2018. The rent history for Apt. 2A then shows that Respondent paid $1,487.53 four times from April of 2018 through June of 2019 and $1,509.85 seven times from July of 2019 through January of 2020. The Court also finds that these latter amounts paid were the monthly rent for those time frames.

The rent history for Apt. 2A shows that Respondent had a credit of $755.92 at the end of August of 2012. Based upon the rental amounts set forth above, Respondent's aggregate rent liability from September of 2012 through January of 2020 is $129,629.89. The rent history also shows that, from September of 2012 through January of 2020, Respondent paid Petitioner a total of $97,427.76. In addition to that, the rent history credits Respondent on January 12, 2017 $10,000.00. Crediting this notation, the credit through August of 2012, and Respondent's payments against his aggregate rent liability leaves a balance of $21,436.23 in rent arrears through January of 2020.

Based upon the monthly rent amounts stated above, Respondent's aggregate rent liability from August of 2012 through February of 2013 and in December of 2018 was $10,865.08. The Court awarded Respondent a seven percent rent abatement during this period. Seven percent of $10,865.08 is $760.56. Based upon the monthly rent amounts stated above, Respondent's aggregate rent liability from March of 2013 through February of 2016 was $50,615.26. The Court awarded Respondent a forty percent rent abatement during this period. Forty percent of

$50,615.26 is $20,246.10. Based upon the monthly rent amounts stated above, Respondent's aggregate rent liability from mid-January of 2019 through June of 2019 was $8,181.42. The Court awarded Respondent a forty percent rent abatement during this period. Forty percent of $8,181.42 is $3,272.57. Based upon the monthly rent amounts stated above, Respondent's aggregate rent liability from April of 2016 through October of 2016 was $10,689.98. The Court awarded Respondent a fifteen percent rent abatement during this period. Fifteen percent of $10,689.98 is $1,603.50. Based upon the monthly rent amounts stated above, Respondent's aggregate rent liability from December of 2011 through June of 2015 was $59,036.17. The Court awarded Respondent a twelve percent rent abatement during this period. Twelve percent of $59,036.17 is $7,084.34 Based upon the monthly rent amounts stated above, Respondent's aggregate rent liability from August of 2012 through September of 2015 was $52,775.46. The Court awarded Respondent an eight percent rent abatement during this period. Eight percent of $52,775.46 is $4,222.04.

The total amount of a rent abatement the Court awards on Respondent's counterclaim is $37,189.11. Offsetting the arrears amount for Apt. 2A, calculated above, of $21,436.23 leaves Respondent with a credit of $15,752.88. As the counterclaim is greater than the arrears balance, the Court dismisses Petitioner's cause of action against Respondent for nonpayment of rent with prejudice through January 31, 2020. The Court awards Respondent a judgment on his counterclaim in the amount of $15,752.88.

The rent history for Apt. 2B shows that Co-Respondent paid $1,527.54 seven times from January of 2010 through July of 2010; $1,618.01 sixteen times from August of 2010 through November of 2011; $1,627.46 seven times from December of 2011 through July of 2012; and

$1,714.21 five times from August of 2012 through July of 2014. The Court finds that these amounts paid were the monthly rent for those time frames.

While there is no such pattern of consistent payments from August of 2014 through July of 2016, Co-Respondent's one-year renewal lease for Apt. 2B, commencing on August 1, 2016, has a one-year renewal rate based upon a base rent of $1,847.06, which is also the rate that increases are based on. As noted above, the adjustment for a one-year renewal lease commencing August 1, 2016 is zero percent. RGB Order 47. Petitioner's charge of $1,847.06 for both the rent prior to August 1, 2016 and the base rent for the lease commencing on August 1, 2016 is therefore consistent and the preponderance of the evidence shows that this was Co-Respondent's rent from August of 2014 through July of 2016. The lease in evidence shows an additional charge rendering the rent for Apt. 2B to be $1,874.95 from August of 2016 through July of 2018. The rent history for Apt. 2B then shows that Co-Respondent paid $1,896.17 five times from August of 2018 through July of 2019 and $1,924.22 five times from August of 2019 through January of 2020. The Court also finds that these latter amounts paid were the monthly rent for those time frames.

The rent history for Apt. 2B shows that Co-Respondent had a credit of $0.20 at the end of November of 2012. Based upon the rental amounts set forth above, Co-Respondent's aggregate rent liability from December of 2012 through January of 2020 is $157,911.80. The rent history also shows that, from December of 2012 through January of 2020, Co-Respondent paid Petitioner a total of $139,675.92. Crediting the credit through November of 2012 and Co-Respondent's payments against her aggregate rent liability leaves a balance of $18,235.68 in rent arrears through January of 2020.

Based upon the monthly rent amounts stated above, Respondent's aggregate rent liability from August of 2012 through February of 2013 and in December of 2018 was $13,895.64. The Court awarded Co-Respondent a seven percent rent abatement during this period. Seven percent of $13,895.64 is $972.69. Based upon the monthly rent amounts stated above, Co-Respondent's aggregate rent liability from March of 2013 through February of 2016 was $64,235.71. The Court awarded Co-Respondent a forty percent rent abatement during this period. Forty percent of $64,235.71 is $25,694.28. Based upon the monthly rent amounts stated above, Co-Respondent's aggregate rent liability from mid-January of 2019 through June of 2019 was $10,428.94. The Court awarded Co-Respondent a forty percent rent abatement during this period. Forty percent of $10,428.94 is $4,171.58. Based upon the monthly rent amounts stated above, Co-Respondent's aggregate rent liability from April of 2016 through October of 2016 was $13,013.09. The Court awarded Co-Respondent a fifteen percent rent abatement during this period. Fifteen percent of $13,013.09 is $1,951.96. Based upon the monthly rent amounts stated above, Co-Respondent's aggregate rent liability from December of 2011 through June of 2015 was $67,621.54. The Court awarded Co-Respondent a twelve percent rent abatement during this period. Twelve percent of $67,621.54 is $8,114.58. Based upon the monthly rent amounts stated above, Co-Respondent's aggregate rent liability from August of 2012 through September of 2015 was $66,999.88. The Court awarded Co-Respondent an eight percent rent abatement during this period. Eight percent of $66,999.88 is $5,359.99.

The total amount of a rent abatement the Court awards on Co-Respondent's counterclaim is $46,265.08. Offsetting the arrears amount for Apt. 2B, calculated above, of $18,235.68 leaves Co-Respondent with a credit of $28,029.40. As the counterclaim is greater than the arrears

balance, the Court dismisses Petitioner's cause of action against Co-Respondent for nonpayment of rent with prejudice through January 31, 2020. The Court awards Co-Respondent a judgment on her counterclaim in the amount of $28,029.40.

Accordingly, it is

ORDERED that Petitioner's cause of action for nonpayment of rent against Respondent is dismissed with prejudice through January 31, 2020, and it is further

ORDERED that Petitioner's cause of action for nonpayment of rent against Co-Respondent is dismissed with prejudice through January 31, 2020, and it is further

ORDERED that the Court awards Respondent a judgment on his counterclaim against Petitioner in the amount of $15,752.88, and it is further

ORDERED that the Court awards Co-Respondent a judgment on her counterclaim against Petitioner in the amount of $28,029.40.

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: New York, New York
January 23, 2020

HON. JACK STOLLER
J.H.C.