2020-02-17

CROTONA PARK REDEVELOPMENT, LLC v. WILLIAMS

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

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CROTONA PARK REDEVELOPMENT, LLC,

Landlord [Petitioner]

-against-

CHANTAY WILLIAMS **DECISION & ORDER**
1440 Crotona Park East, Apt 4B
Bronx, NY 10460

Tenant [Respondent]

"JOHN DOE" AND "JANE DOE"

Undertenant [Respondents]

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Hon. Diane E. Lutwak:

This is a nonpayment eviction proceeding against a tenant residing in a privately-owned, project-based Section 8 development. The primary question for this court to decide, after trial, is the legality of the landlord's actions in terminating the tenant's housing assistance and charging her a market rate rent due to her failure to relocate to a smaller apartment based upon her household size and the development's occupancy standards. For the following reasons, the court finds the termination of assistance was proper and, as Respondent failed to establish any other defense, Petitioner is entitled to a final judgment of possession and a money judgement for unpaid rent.

PROCEDURAL HISTORY

Crotona Park Redevelopment, LLC (Petitioner) brought this proceeding against Chantay Williams (Respondent[1]), the tenant in possession of Apartment 4B at 1440 Crotona Park East, Bronx, New York (hereinafter "the subject apartment"), based on the allegation that she had failed to pay past due rent. The Petition is dated May 10, 2017, alleges there is a written rental agreement to pay rent of $1386 per month and seeks rent arrears of $3309.61, comprised of rent for March and April 2017 at the rate of $1386 per month, $518 for February 2017 and $19.62 for January 2017. The Petition states that the rent was demanded by a five-day written

[1] The petition and caption include undertenants named as "John Doe" and "Jane Doe". As no one other than Chantay Williams has appeared, all references herein to "Respondent" refer to her unless otherwise stated.

notice, a copy of which is attached, and that Respondents' tenancy is subject to the Rent Stabilization Law of 1969.

Respondent *pro se* filed an Answer to the Petition on May 30, 2017 raising a "general denial"; a defense of payment; and, in the "other counterclaim(s)" section, the statement, "As per previous stipulation the rent has been paid; I signed my lease February 2017 and I have yet to receive the copy of the lease."

The initial court date was June 7, 2017, at which Respondent appeared by counsel. Petitioner consented to Respondent serving an Amended Answer and Respondent consented to paying ongoing use and occupancy of $518 per month, without prejudice.

Respondent's Amended Answer, dated June 23, 2017, contains a general denial; two self-styled "jurisdictional defenses" alleging a defective predicate rent demand and Petition as they seek "the full monthly rent" whereas Respondent is "entitled to a monthly rent subsidy" which Petitioner either "illegally canceled" or failed to credit "and/or has illegally failed to properly process and submit Respondent's Annual Income Certification;" a first affirmative defense of entitlement under HUD [United States Department of Housing and Urban Development] regulations to a monthly rent subsidy which Petitioner "has either illegally canceled" or failed to credit "and/or has illegally failed to properly process and submit Respondent's Annual Income Certification"; a second affirmative defense that Petitioner illegally refused to process Respondent's request to add her nephew to her household composition; a third affirmative defense that Petitioner's attempt to compel Respondent to relocate was illegal as it relied upon a defective notice, offered an apartment that was "legally unfit for occupancy" and resulted in the illegal cancelation, removal or failure to credit the rent subsidy upon Respondent's "legal and justifiable refusal to relocate"; a fourth affirmative defense that Petitioner violated Respondent's due process rights under both the U.S. and New York State Constitutions by failing to give her proper notice of the termination of her HUD rent subsidy; a fifth affirmative defense and two counterclaims based on breach of the warranty of habitability, seeking affirmative relief of a 50% rent abatement and an order to correct violations; and a counterclaim for costs, disbursements and fees.

Motion practice followed. Petitioner's motion for summary judgment and other relief was denied by Decision and Order of February 28, 2018. By Decision and Order of December 3, 2018 the court granted both Petitioner's motion to quash Respondent's subpoena for documents regarding the termination of her rent subsidy and proposed relocation and Respondent's cross-motion for discovery seeking essentially the same documents. After a

series of additional adjournments for various reasons[2] the trial took place on May 30, 2019, July 26, 2019 and January 3, 2020.

TRIAL

Petitioner's Case

Petitioner presented its case through the testimony of Sabrina Lora, who, as of the time of her testimony on May 30 and July 26, 2019, had worked for Petitioner's management company Alma Realty Corp. as HUD Relationship Manager for nineteen years. Ms. Lora testified that the Crotona Park Complex consists of seven buildings, five of which, including the building where Respondent resides, have addresses on Crotona Park East; the two others are on Bristol Street and Elsmere Place, respectively. Ms. Lora became the supervisor for the management team handling the Crotona Park Complex in February 2018, at which time Leslie Roman was the manager of Respondent's building. When Ms. Roman left her position on July 2, 2018 Ms. Lora became the acting manager for Respondent's building. Ms. Lora testified that she is fully familiar with the contents of Respondent's tenant file.

Through Ms. Lora's testimony and various documents admitted into evidence, Petitioner established that it is a proper party to commence this proceeding pursuant to RPAPL § 721, that the building is currently registered with the New York City Department of Housing Preservation and Development (HPD) as a multiple dwelling and that Petitioner has a multi-year, Project-based Section 8 Housing Assistance Payments contract with HUD, with the New York State Housing Trust Fund Corporation (NYSHTRFC) as Contract Administrator. That Respondent is the tenant of the subject apartment was established through her most recent "Model Lease for Subsidized Programs" signed on January 1, 2013. An "Owner's Certification of Compliance with HUD's Tenant Eligibility and Rent Procedures" ("HUD-50059 form") signed the same day as the 2013 "Model Lease" established that Respondent's "Total Tenant Payment" based upon her household income at that time was $519, the HUD assistance payment was $811 and Respondent's household was comprised of two people: herself and her grandson[3].

Regarding the "Model Lease" signed on January 1, 2013, Ms. Lora testified that new leases are executed only when HUD makes changes to the verbiage. Paragraph 2 of that lease reflects an initial one-year term beginning on February 1, 2013 with automatic renewals for successive one-year terms unless the tenancy is terminated under paragraph 23 of the lease. Regarding the amount of the tenant's share of the rent, in paragraph 4 of the lease the tenant

[2] The significant delays in the progress of this proceeding were due to two sets of unfortunate circumstances beyond the control of the parties and the court: First, in 2017, was the untimely death of the Resolution Part Judge, the Honorable Charlie Liu; second, in 2019 after two days of trial, was Respondent's attorney's emergency hospitalization.

[3] According to the HUD-50059 forms in evidence, the grandson's date of birth is in February 2006, making him 13 years old at the time of Ms. Lora's testimony and about to turn 14 years old at the present time.

agrees that it may be changed during the lease term in specified circumstances, including where there are changes in the tenant's household composition and/or income. Regarding the "size of dwelling", in paragraph 19 of the lease the tenant acknowledges that HUD requires the landlord to assign units in accordance with the landlord's written occupancy standards which consider the unit size, the age, sex, relationship of family members and the family preference. If the tenant becomes eligible for a different size unit and the required size unit becomes available, paragraph 19 also states the tenant's agreement to:

(a) move within 30 days after the landlord notifies him/her that a unit of the required size is available within the project; or
(b) remain in the same unit and pay the HUD-approved market rent.

Ms. Lora testified that a household of two people is not permitted to reside in a three-bedroom apartment according to federal regulations, the HUD Handbook and the project's Tenant Selection Plan and, instead, is to be assigned a one- or two-bedroom apartment, with up to two people in each bedroom, as soon as one is available. Ms. Lora's review of Respondent's file indicated that she had been over-housed since at least 2009.

By letter dated May 2016 Petitioner's management company Alma Realty Corp. was notified by its Contract Administrator NYSHTFC that it had conducted an occupancy analysis of all Section 8 projects within its portfolio and had identified a number of units at the Crotona Park Complex that were "potentially over-housed", including Respondent's apartment. The letter cites to the Occupancy Standards in the property's Tenant Selection Plan and the rules for "Unit Transfers Due to a Change in Family Composition" in HUD Handbook 4350.3. The letter states it is for informational purposes and does not require any immediate action. However, the letter cautions that NYSHTFC "may initiate any corrective action measures available in order to maximize the utilization of Section 8 funding" if a future analysis "indicates a persistent issue with HUD compliance on occupancy standards".

Ms. Lora testified that after receiving the Contract Administrator's May 2016 letter, Leslie Roman, Petitioner's Site Manager for Respondent's building at the time, sent Respondent three letters advising her that she was over-housed and would have to relocate, as follows:

(1) First letter - dated August 9, 2016, advising Respondent that her name is on the Contract Administrator's list of HUD-assisted tenants who "need to right size due to the family household composition". The letter refers to "HUD Regulation 4350.3" and informs Respondent that, "when a unit becomes available that correspond[s] with your household composition you will be given 30 days to transfer to the new unit. Keep in mind if you are notified of the transfer and if you refuse to transfer you will not be granted HUD subsidy, which means you will be responsible for the full contract rent amount at the time of denial since this will violate program policies." The letter invites Respondent to call Ms. Roman with any concerns. A note at the bottom of the letter indicates that it was delivered by hand and by mail.

(2) Second letter - dated November 30, 2016, advising Respondent that a "2BR has become available for your household composition size. A transfer will be in on or about DECEMBER 15, 2016 OR JANUARY 1, 2017" and that Petitioner "is transferring you to a 2 (TWO) bedroom apartment at 1432 CROTONA PARK EAST, UNIT #5A, Bronx, NY" (hereinafter "the relocation apartment"). The letter goes on to say: "We will notify you as it gets closer to the move out date for you to come to the office to sign all the transfer paperwork and pick up the keys." The letter further advises Respondent that if she refuses to move she may remain in her apartment, lose her HUD subsidy as of February 1, 2017 and be responsible for paying the HUD approved monthly market rent of $1415. In closing, the letter invites Respondent to call Ms. Roman if she has any questions. A note at the bottom indicates that it was delivered "BY HAND AND CERITY [as in original]" and a copy of an envelope postmarked December 6, 2016 is attached. Ms. Lora described this letter as notice to Respondent that she would have to move "By January 31, 2017. Sixty days later than the letter." The amount of the market rent stated in the letter was set by HUD, with no input from Petitioner.

(3) Third letter - dated February 6, 2017, almost identical to the second letter except with February 15 as the date that "A transfer will be in on about" and March 1 as the date on which Respondent would lose her subsidy and be responsible to pay the HUD approved monthly market rent of $1415. if she refused to move. Ms. Lora described this letter as an extension of the move-out date until February 28.

A fourth letter dated February 15, 2017 from Petitioner is addressed "To Whom it May Concern" and states that it is verification that Respondent is "the tenant head of household currently residing at" the relocation apartment for the purpose of setting up a Con Edison account. The letter states that the tenant's lease "is effective 2/15/17 but she did not gain possession of the unit until 2/17/17."

Other documents pertaining to the transfer of Respondent's tenancy to the relocation apartment admitted into evidence were:

(1) A "Tenant TRANSFER MOVE IN Form" which Ms. Lora testified is required to be sent to the main office so that they can make the changes in their software. The form includes a "Transfer Effective Date" of 2/15/17, with a lease term starting 2/15/17 and ending 1/31/18. The form states the names of Respondent and her grandson as occupants and a monthly rent of $1287 with a tenant portion of $552 and a HUD portion of $735.

(2) A HUD-50059-A form which Ms. Lora testified was sent electronically to HUD as notification of Respondent's transfer out of the subject apartment, signed at the bottom by Respondent and Leslie Roman, each hand-dated 2/17/17.

(3) A HUD-50059 form, also sent electronically to HUD, as notification of Respondent's transfer in to the relocation apartment, signed by Respondent on the "Head of

Household" line and by Ms. Roman on the "Owner/Agent" line, each hand-dated 2/17/17.

(4) Three "Work Order" forms pertaining to the relocation apartment:
   a. # 70034, call-in date of 2/13/17, for "Renovation Bathtub Corp." to re-glaze the bathtub. Notes on the form include "vacant until 2/15/17", the super's name and telephone number and: "IF AFTER 2/15/17 PLEASE CONTACT TENANT CHANTAY WILLIAMS TO MAKE ARRANGEMENTS" with a phone number. The form is signed and hand-dated 2/26/17 at the bottom; on the line labeled "Occupant" the word "Super" is handwritten in. Attached to the Work Order form is a Renovation Bathtub Corp. invoice dated 2-27-17.
   b. # 70648, call-in-date of 3/6/17, to address the three HPD violations.[4]
   c. # 70758, call-in date of 3/9/17, with the notes: "HPD COURT-Living Floor, Bathroom ceiling." Ms. Lora identified the signature at the bottom (dated 3/10/17) as being that of Leslie Roman.

Ms. Lora testified that Respondent was given an opportunity to see the relocation apartment and, when asked when that would have been Ms. Lora answered, "When we sign the certification for a transfer, that's the day she's given the key and given a walk-through."

Respondent commenced an HP Action against Petitioner regarding the relocation apartment by Order to Show Cause and Petition dated February 22, 2017 with a return date of March 6, 2017 and an inspection by HPD scheduled for March 1, 2017. Ms. Lora testified that Respondent let the HPD inspector in to the relocation apartment on March 1. Certified copies of the documents from the HP Action were admitted into evidence. In the Petition and Inspection Request Respondent alleged the following conditions: "(1) Paint job; (2) Tub; (3) House door; (4) Bathroom window; (5) Living floor." At the inspection HPD found and placed three violations: (1) broken or defective wood wall cabinet in kitchen; (2) broken or defective sloping wood floor in the "1st room from east"; and (3) defective entrance door lock. A certified copy of a "Closed Violation Report" printed on May 29, 2019 indicates that the three violations were dismissed and marked "DEEMED COMPLIED".

Ms. Lora testified that Respondent returned the relocation apartment keys to the management office on March 1, 2017 and never moved in. Respondent retained an attorney who sent Ms. Roman an undated letter in an envelope postmarked March 17, 2017 asking that her office be informed "as to any future actions that your office may take" against Respondent. The letter states that the attorney was retained "in regard to various issues involving her

[4] Each party offered into evidence a copy of this Work Order # 70648, the difference between them being that while Petitioner's has no signature or other markings at the bottom, Respondent's has a signature that appears to be the same as the one on Work Order #70759, identified by Ms. Lora as that of Leslie Roman, and the handwritten notation: "This unit i[s] new see Pictures Attached."

tenancy" but does not mention anything about relocation. The relocation apartment was rented to another family at the end of April 2017.

Petitioner's Tenant Selection Plan for the complex, which was approved by HUD, was admitted into evidence. Ms. Lora described it as a document that sets forth certain requirements for the complex, including "occupancy standards" for apartments based on the number of bedrooms. For a 2-bedroom apartment, the minimum number of occupants is two and the maximum number is four. For a 3-bedroom apartment, the minimum number of occupants is three and the maximum number is six. Ms. Lora testified that there were approximately thirty households waiting for a 3-bedroom apartment like Respondent's on March 1, 2017, and approximately that same number or more now.

Ms. Lora testified that when Respondent failed to move her HUD subsidy was terminated on February 28, 2017 and her rent went up to market rate on March 1, 2017. Based on annual HUD Rent Schedules effective October 1, 3-bedroom apartment market rents were $1415 as of March 1, 2017, $1419 as of October 1, 2017 and $1442 as of October 1, 2018. Ms. Lora testified that Respondent never paid the market rents but continued to pay a lower amount of $549. Accordingly, Petitioner's attorneys prepared a written rent demand and, when Respondent failed to pay, commenced this proceeding. The court took judicial notice of the rent demand, petition, notice of petition and affidavits of service in the court file. As of the date of Ms. Lora's testimony in July 2019 Respondent owed $27,110.62; a ledger Ms. Lora prepared showing rent charged and payments made from January 2017 through July 2019 was admitted into evidence over objection.

Ms. Lora testified that if Respondent had moved her subsidy would have gone with her and her share of the rent would have remained the same, based on her income. Even after this case commenced, through counsel Petitioner offered Respondent another available 2-bedroom apartment in the Crotona Park Complex. However, there was no response to the two letters Petitioner's attorney sent Respondent's attorney in October 2017 or to the two emails he sent her in November 2017.

Because of a transmission error on HUD's end, even though Petitioner had notified HUD that it had terminated Respondent's housing assistance effective March 1, 2017 Petitioner continued to receive HUD subsidies for Respondent's apartment for over a year. When she started supervising the complex Ms. Lora had responsibility for investigating and correcting this error, which was resolved in April 2018. Petitioner had to reimburse HUD $12,082, comprised of fourteen months of subsidy funds for March 2017 through April 2018.

On cross-examination Ms. Lora testified that it is the landlord, operating the building on behalf of HUD, and not HUD, that sends the tenant a 30-day notice when a subsidy is going to be terminated. Respondent was sent notices first in August 2016, "letting her know she would have to move", and then on November 30, 2016, "identifying the apartment she was supposed to move into" with a move-in date of January 1, 2017. Ms. Lora testified that the notice is not a

warning, it's a letter advising of two options: either stay and lose the subsidy or move with the subsidy. Ms. Lora also described the November 30, 2016 letter as notice to Respondent that she had until January 31, 2017 to move, and that if she didn't move she would lose her subsidy as of February 1. When asked to explain the February 15 move-in date mentioned in the February 6 letter Ms. Lora answered, "Seems they gave her an extension."

Regarding the language in both the November 30 and February 6 letters saying that "we will notify you as it gets closer to the move out date for you to come to the office to sign all the transfer paperwork and pick up the keys", Ms. Lora testified that this did not mean there would be any further written notification, and that "By notify, we would call her. These letters are required. If I'm going to tell her something I'll pick up the phone."

Ms. Lora testified that other than in court she had only met Respondent once, when she went to her apartment in May 2019 to inspect an electrical condition Respondent had complained about. When asked what would happen if a tenant is supposed to transfer and the apartment is not in move-in condition Ms. Lora answered, "We wouldn't give the key." When asked what she would do if a tenant gave a reason why they couldn't move Ms. Lora answered it would depend on what the reason was and, "We definitely work with tenants, especially if they're transferring, they want their new home to be in the same condition as the one they're leaving. We work with the tenants; we want them to feel comfortable as much as possible. If the tenant reports it, we're going to make it work."

Petitioner requested that the pleadings be amended to conform to the proof at trial and then rested its case. After Petitioner rested Respondent moved orally to dismiss, arguing, *inter alia*, that the Petition is defective as it asserts that Respondent's apartment is Rent Stabilized when it is not and instead is in a HUD-subsidized, project-based Section 8 development.

Respondent's Case

Respondent's case consisted solely of her own testimony, much of which was in the form of yes and no answers to leading questions as well as some rambling and nonresponsive answers, which were not objected to. She has resided for over thirty years in the subject apartment and knows she lives in a HUD-subsidized building where rents are calculated based on income.

Respondent acknowledged receipt of Petitioner's letter of November 30, 2016. She testified that she did not receive any notification that an apartment was ready between the date she received the November 30 letter and December 15, 2016. She recalled being notified of an available apartment in February 2017 and acknowledged receipt of Petitioner's letter of February 6, 2017. When asked if prior to receiving that she had been notified "of a specific date or a specific apartment you needed to move in to" Respondent answered no. When asked if she was notified prior to February 15 that the apartment was ready to move into Respondent answered no. When asked when she was "actually notified that the apartment was ready to move in to" Respondent answered: "I had to be recertified. My lease was up in February, when

I went down to the office to recertify, I went to Leslie Roman on November 29, 2016. I gave her my four pay stubs to be recertified and then she took the paperwork and then I had made knowledge to her prior to that that I wanted to add my nephew to the lease because he was in college and he was going to stay with me. So she said to me to wait until she does the paperwork for the recertification in January. Then when I went back to the office to sign my lease she kept saying the lease wasn't ready, wait until February, and then she hit me with this letter that said I had to be transferred to a 2-bedroom at 1432 Crotona Park East, Apartment 5A." This meeting, at which Ms. Roman told her she had to downsize and transfer to another apartment and gave her a copy of the February 6, 2017 letter, took place on February 3, 2017.

Respondent returned to the management office in the middle of February and recalled a conversation with Ms. Roman in which she was told that "no one would be added to the lease." Respondent testified that she never received the key for the relocation apartment although she did enter that apartment once with Ms. Roman who had the key, on a Saturday in early February. During the walk-through Respondent found a number of problems: the floors were sunken; both bedrooms had problems with the closets; one bedroom also had a broken window with a board against it and a dislodged radiator; the bathtub "looked like it hadn't been cleaned for years"; and the bathroom had a poor paintjob with mold on the top of the wall. After inspecting the relocation apartment Respondent told Ms. Roman that she was not accepting it. Ms. Roman told her she should take it as is and the repairs would be done after she moved in.

When asked what happened after the conversation with Ms. Roman at the relocation apartment Respondent answered: "After the conversation with Ms. Roman I actually had a previous court date with management and housing for repairs to be done in MY apartment.[5] When that happened, I think the night when I got home I had a notice taped all over the door that I owed over $13,000 in rent. The day I went to court and the judge gave them 30 days to do the repairs in MY apartment, 4B, I went in my purse and I said what is this, this was stuck all over my door the night before. The lawyer who attended that looked at it and said she had no knowledge of this. She informed me to go to the second floor to talk to someone about this. And I never owned any money as long as I lived there for 30 years. Never owed any money, no eviction notice, nothing. And this was on my door."

When asked if she took any action as to the relocation apartment Respondent answered yes, she filed an HP Action, and identified the papers from that case, HP Index #12120/17, that were already in evidence. However, Respondent appeared to be confused about the timing of that case and may have mixed it up with the second HP Action she filed in 2017 regarding the

[5] The court system's data base reflects that on March 6, 2017 Respondent filed HP Index # 14533/17 against Petitioner, pertaining to the subject apartment. That case had an initial return date of March 29, 2017 when an order based on default was signed, followed by one more court appearance on May 4, 2017, when a motion to restore was settled.

subject apartment[6]. Even though it is evident from the face of the #12120/17 papers that they were filed on February 22, 2017 and had a return date of March 6, 2017 she testified that she filed the paperwork for that case on March 6, 2017 but never had a court date after that. She acknowledged there had been an inspection and her attorney asked the court to take judicial notice of the three violations HPD issued. After filing that HP Action, Respondent testified that she went back to the management office to request a lease for the subject apartment. Ms. Roman told her she would not be getting that lease, that Petitioner would not accept her rent anymore and they would "put me in holdover". When asked if she had any interaction after March 6, 2017 with management regarding the relocation apartment, or if she ever returned to it, Respondent answered no.

From that point on Respondent paid rent at the rate of $549 because Ms. Roman had told her that was the amount to pay. When asked if she received any documents after March 6, 2017 stating what rent she was supposed to pay at the subject apartment or if she received any notification that her HUD subsidy had been suspended Respondent answered no. Respondent testified that she did not know that her subsidy had been terminated, saying "nobody ever told me".

When asked why she did not move to the relocation apartment Respondent answered that it was because of the violations there. Over the years Petitioner has delayed making repairs and Respondent has had to take Petitioner to Housing Court and arrange on her own for work to be done. Based on that experience she had no faith that Petitioner would make the repairs that were needed in the new apartment. Respondent testified, "I can understand HUD rules and regulations, but when you're doing a transfer don't put me in a dump house thinking that I'm going to fix that apartment again, because I'm not." Also, Petitioner gave her only two weeks to move, which was not enough time given that she works and needed more time to take things down like vertical blinds and mirrors.

After she filed the HP Action for the subject apartment Petitioner made repairs, including painting, fixing floors and a few other things, although Respondent had to buy the materials. She also had electrical problems in her bedroom and kitchen in 2019 which were repaired. Ms. Lora came to inspect her apartment in connection with the electrical problems but other than that visit and the court appearances in this case Respondent has had no interactions with her.

On cross-examination Respondent denied receipt of Petitioner's first letter, dated August 9, 2016, advising of the need to downsize. Respondent acknowledged receipt of Petitioner's second and third letters dated November 30, 2016 and February 6, 2017 which advised her that she would be responsible for paying the full market rent of $1415 if she did not move to the relocation apartment. When asked about her inspection of the relocation apartment with Ms. Roman Respondent testified that she could not recall the date, but it was

[6] *See* fn 5, *supra*.

on a Saturday in early February. Later in her cross-examination when asked again about the timing of that inspection Respondent answered, "Me and Ms. Roman saw the apartment before 2017".

Respondent acknowledged her signatures on the HUD-50059 and HUD-50059-A forms dated February 17, 2017 but denied having signed them after she inspected the relocation apartment. She testified that they had "nothing to do with the transfer, this was supposed to be the lease for 1440, 4B" and that she thought she had signed them when she met with Ms. Roman at her office either on November 29, 2016 or in early February 2017 and that they were for her lease at the subject apartment, not at the relocation apartment. When asked if she had met with Ms. Roman numerous times Respondent said no, she had met with her "three times, that's it".

Respondent acknowledged that the papers she filed in the HP Action on February 22, 2017 regarding the relocation apartment did not mention any of the conditions she had observed and testified about – problems with the closets in the bedrooms, mold in the bathroom, a dislodged radiator and "busted window" covered with a board in one of the bedrooms. The only time she requested keys for that apartment was on March 1, 2017, the day the inspector came. After getting the keys from Ms. Roman she entered the apartment with the inspector, walked out with him, locked the door and returned the keys. She did not discuss the conditions or a plan to remediate them that day and did not request any follow up meeting. After March 1, 2017 Respondent did not know the condition of the relocation apartment and whether it was habitable. Her next communication with Ms. Roman was through her attorney, who sent an undated letter postmarked March 17, 2017 that did not mention the proposed relocation and said, "don't take any action without contacting me first."

When asked about the HP Action she filed for the subject apartment and whether she was "content to live with violations" in that apartment Respondent, responded, "Sure, after I invested a lot of money in Apartment 4B, I wasn't going to do it in 5A again." Respondent testified that she does not have a lease, although she acknowledged that the Model Lease in evidence was her lease and that she doesn't recertify on an annual basis anymore.

Respondent acknowledged that Petitioner offered her a second 2-bedroom relocation apartment after this proceeding started. She went to see it and rejected it because the windows were old and "nothing was level".

On redirect, Respondent testified that she did not view the relocation apartment in 2016, and the first time she saw it was in the beginning of February 2017. When asked if it was her intent to move when Leslie Roman notified her of an available apartment Respondent answered no, "because prior to that conversation I had said to her at the beginning of the year I wanted to add my nephew to the lease, he was in college, he had nowhere to stay. She said I had to wait until I had to recertify. Then the stuff came up about moving." Upon reviewing the

papers from the HP Action Respondent clarified that she first went to court on that case on February 22, 2017 and the inspection followed on March 1, 2017.

Regarding the conditions in the subject apartment Respondent testified about a property damage action she had filed in Civil Court in 2015 in which she won $600 for damage to her coats in the hallway closet and an order to repair the living room floor which had been water damaged. Regarding the HP Action she filed in 2017 Respondent testified that she spoke with Ms. Lora about the conditions and the work was done in October or November 2018 by a super from another building, using materials she had purchased.

Petitioner's Rebuttal Case

Petitioner called its on-site superintendent Teovaldo Estevez Ramirez as a rebuttal witness. He has worked for Petitioner for more than five years. He was familiar with both the subject apartment and the relocation apartment, having made repairs in the former and supervised repairs in the latter. He identified photographs taken of the relocation apartment, although he could not specify a date when they were taken, saying they showed how the apartment looked in approximately February, March or April 2017 before a new family moved in. The photographs show a vacant apartment with freshly painted walls; new cabinets, floor tiles and counters in the kitchen; new tiles, grout and bathtub in the bathroom; smooth and varnished wood floors in the bedrooms and/or living room; one window with a fire escape gate, one window with a child-safety gate and one window with a large piece of plywood covering approximately the bottom two-thirds.

On cross-examination when asked about the window covered with plywood the super explained that the plywood was placed there to block a light that was bothering a neighbor. The only problem with that window had been a balance that needed to be repaired. The super testified that he visited the relocation apartment around seven times during that period but could not recall any of the dates or when the work was completed. After the repairs were completed he returned to the apartment to give the keys to the new tenant, who "is still there with no complaints."

DISCUSSION

As an initial matter, Petitioner's request to conform the pleadings to the proof adduced at trial is granted and Respondent's request for dismissal of the proceeding because of the erroneous statement in the Petition that the subject premises are Rent Stabilized is denied. Respondent cannot assert surprise or prejudice due to this erroneous statement as she herself asserted in her Verified Amended Answer dated June 23, 2017 that her apartment was subject to HUD regulations.

A party may move for leave to amend its pleadings at any time, even after trial. CPLR Rule 3025(b). The court may permit pleadings to be amended before or after judgment to conform them to the evidence at trial. CPLR Rule 3025(c). Applications to amend under both

subdivisions (b) and (c) are to be determined in the same manner and by weighing the same considerations; that is, they should be freely granted absent prejudice or surprise to the non-moving party, even after trial, *Kimso Apts, LLC v Gandhi* (24 NY3d 403, 411, 23 NE3d 1008, 1013, 998 NYS2d 740, 745 [2014]), except that under 3025(c) the possibly increased effect on orderly prosecution of the trial might also be a factor to consider, *Murray v New York* (43 NY2d 400, 405, 372 NE2d 560, 562, 401 NYS2d 773, 774-775 [1977]).

Here, there is certainly no surprise as to the type of housing Respondent lives in and the court cannot discern any prejudice that would accrue to Respondent upon an amendment of the Petition to reflect the correct regulatory status of the premises. Respondent has not alleged that she changed her position based on the erroneous reference to Rent Stabilization and omission of a proper reference to the federally-subsidized nature of the premises, or that the error hindered the preparation of her case or prevented her from taking some measure in support of her position, which is how "prejudice is defined for purposes of amending a pleading." *Whalen v Kawaski Motors Corp, USA* (92 NY2d 288, 293, 703 NE2d 246, 680 NYS2d 435 [1998]); *Loomis v Civetta Corinno Constr Corp* (54 NY2d 18, 23, 429 NE2d 90, 444 NYS2d 571 [1981]). Without such a showing of prejudice, the court exercises its discretion to allow the Petition's misstatement as to the nature of the tenancy to be amended to conform with the evidence at trial. *See Jordan v McCauley* (178 Misc2d 216, 679 NYS2d 880 [App Term 1st Dep't 1998]); *170 W 85th St Hous Dev Fund Corp v Marks* (40 Misc3d 1227[A], 975 NYS2d 710 [Civ Ct NY Co 2013]). The evidence at trial established that Petitioner is a privately-owned, HUD-subsidized Section 8 development which Respondent was well-aware of and the Petition is hereby deemed to reflect this.

Regarding Respondent's second affirmative defense that Petitioner refused to process her request to add her nephew to her household, Respondent presented no evidence of when she made the request or what she submitted to the management office. Nor was there any evidence of the connection between Respondent's purported request, Petitioner's alleged denial of that request and this nonpayment proceeding. To the extent Respondent is arguing that had her (unproven) request to add her nephew been granted, she would not have been "over housed" and would not have had to relocate to a 2-bedroom apartment, such argument ignores HUD occupancy standards, discussed below, that contemplate two-persons-per-bedroom, taking into consideration age, gender and relationship. There was simply no evidence presented about Respondent's grandson and nephew from which the court can conclude that a 2-bedroom apartment would not be the right size for Respondent's family even if her nephew were to join them.

Regarding Respondent's fifth affirmative defense and two counterclaims based on breach of the warranty of habitability, while Respondent testified about repairs she needed in the past, the court cannot award a rent abatement given her "vague and unparticularized testimony" as to what the conditions were, how long they lasted, when she reported them to Petitioner, whether Petitioner initially refused to make repairs or scheduled and then failed to

appear for access dates and how the conditions affected her use and enjoyment of the premises. *227J LLC v Barker* (55 Misc3d 145[A], 58 NYS3d 876 [App Term 1st Dep't 2017]). Further, as she testified there are no current problems in her apartment there is no basis for the court to issue an order to correct.

The remaining and critical question raised by Respondent in her two "jurisdictional defenses"[7] and her first, third and fourth affirmative defenses is whether Petitioner was entitled to charge her a market rent beginning March 1, 2017 due to her failure to relocate from her 3-bedroom apartment to the 2-bedroom apartment she was offered in another building in the Crotona Park Complex. This court has jurisdiction to determine the propriety of Petitioner's actions in terminating Respondent's subsidy after she refused to accept the relocation apartment and then charging her a market rent. *1199 Hous Corp v McCartney* (171 Misc2d 239, 656 NYS2d 592 [App Term 1st Dep't 1997]); *E Harlem Pilot Block Bldg 1 HDFC v Cordero* (196 Misc2d 36, 763 NYS2d 203 [Civ Ct NY Co 2003]) *and cases cited therein*.

It is undisputed that applicable to this proceeding are the provisions of HUD Handbook 4350.3 REV-1: Occupancy Requirements of Subsidized Multifamily Housing Programs (hereinafter HUD Handbook), issued on June 12, 2003 and thereafter amended a number of times including on June 29, 2007 ("Change-2"). *See, e.g., Henry Phipps Plaza S Assoc Ltd, Partnership v Quijano* (137 AD3d 602, 26 NYS3d 701 [1st Dep't 2016], *rev'g for reasons set forth in dissenting op of Schoenfeld, J,* 45 Misc3d 12, 14, 993 NYS2d 428 [App Term 2014]); *Green Park Associates v Inman* (121 Misc2d 204, 205, 467 NYS2d 500, 501 [Civ Ct Kings Co 1983]).

The HUD Handbook requires owners to "develop and follow occupancy standards that take into account the size and number of bedrooms needed based on the number of people in the family." HUD Handbook, Ch. 3, § 3-23(A)(1). Generally, a two-persons-per-bedroom standard is acceptable, Ch. 3, § 3-23(E)(2), taking into consideration the age, sex and relationship of family members, Ch. 3, § 3-23(E)(4)(b). Where the family size changes after initial occupancy "the owner may require the family to move to an available unit of appropriate size." Ch. 3, § 3-23(H)(1)(a)(1). Owners must describe their unit transfer policies, including "acceptable reasons for transfers", in a written "Tenant Selection Plan". Ch. 7, § 7-16(C).

Here, it is undisputed that:

- Petitioner's Tenant Selection Plan contains occupancy standards setting a minimum of three and maximum of six occupants for a 3-bedroom apartment and a minimum of two and maximum of four occupants for a 2-bedroom apartment.

[7] The alleged defectiveness of the predicate notice and Petition are not "jurisdictional defenses" as they do not implicate the court's subject matter jurisdiction. *433 West Assocs v Murdock* (276 AD2d 360, 360-361, 715 NYS2d 6, 8 [1st Dep't 2000]).

- Respondent's lease includes an agreement that she would move if she became "eligible for a different size unit", after receiving a 30-day notice, with the option to remain in her apartment and pay the HUD-approved market rent.
- Since 2009 Respondent has been residing solely with her now almost 14-year-old grandson[8] in a 3-bedroom apartment.[9]

The HUD Handbook provides that when an owner determines a tenant is required to transfer to a smaller apartment to comply with occupancy standards it must not terminate assistance "until the family has been offered a transfer to a unit of appropriate size and has been given sufficient time (no less than 30 days) to move to the new unit." Ch. 7, § 7-15(B); Ch. 7, § 7-16(B)(1). When a tenant's assistance is terminated, "the owner increases the tenant's rent to market rent". Ch. 8, § 8-6(A)(1). A family that refuses to move to the correct size unit may stay in the current unit and pay market rent. Ch. 3, § 3-23(H)(1)(a)(2); Ch. 7, § 7-16(B)(1); Ch. 8, § 8-5(D). A tenant's failure to move to a different-sized unit within thirty days after receiving notice of its availability from the owner is one of the six circumstances in which an owner "must terminate a tenant's assistance". Ch. 8, § 8-5(D). To terminate assistance, "an owner ***must*** provide proper notice to the tenant of the increase in the tenant's rent". Ch. 8, § 8-6(A)(2) [emphasis added].

Regarding the content of the notice, the Handbook does not provide a sample but lists the following which the written notice "***should*** include" [emphasis added]:

(a) The specific date the assistance will terminate;
(b) The reason(s) for terminating assistance;
(c) The amount of rent the tenant will be required to pay;
(d) Notification that if the tenant fails to pay the increased rent, the owner may terminate tenancy and seek to enforce the termination in court; and
(e) The tenant has a right to request, within 10 calendar days from the date of the notice, a meeting with the owner to discuss the proposed termination of assistance.

Ch. 8, § 8-6(A)(3).

Regarding the method of service of the notice, the Handbook says it "***should*** be served" [emphasis added] by both first-class mail and delivery to "any adult person answering the door at the unit". If no adult answers the door, the delivered copy can be placed under or through, or affixed to, the door. Ch. 8, § 8-6(A)(4). Service is deemed effective once the notice has been both mailed and hand delivered. Ch. 8, Section 1, § 8-6(A)(6).

[8] *See* fn 3, *supra*.

[9] While Respondent testified that she had requested and been denied permission to add her college student nephew to her household, as discussed above she provided no details from which this court could conclude either that this was a bona fide request or that such an addition to the household would have vitiated Petitioner's determination that she was over-housed.

The bulk of the case law in which landlords sued tenants of privately-owned, project-based Section 8 buildings for nonpayment of rent after terminating their HUD subsidies and raising rents to market level involve situations where the reason for the termination of the subsidy was the tenant's alleged failure to comply with recertification requirements; the result frequently is dismissal of the petition due to the landlord's failure to comply with the recertification mandates of the HUD Handbook. *See, e.g., SEBCO IV Assoc LP v Colon* (2019 NY Slip Op 50765[U], 63 Misc3d 1227[A][Civ Ct Bx Co 2019]); *Fulton Park Assocs v Wells* (2018 NYLJ LEXIS 2976 [Civ Ct Kings Co 2018]); *Lower E Side II Assn v Aaron* (58 Misc3d 1213[A], 93 NYS3d 626 [Civ Ct NY Co 2017]); *Lambert Houses Redevelopment Co v Jobi* (43 Misc3d 1227[A], 992 NYS2d 159 [Civ Ct Bx Co 2013]); *Prospect Heights Assoc v Gonzalez* (34 Misc3d 1203[A], 943 NYS2d 794 [Civ Ct Kings Co 2011]); *Diego Beekman MHA HDFC v Owens* (29 Misc3d 1226[A], 920 NYS2d 240 [Civ Ct Bx Co 2010]; *Lower E Side I Assoc LLC v Estevez* (6 Misc3d 632, 636-637, 787 NYS2d 636, 640 [Civ Ct NY Co 2004]); *E Harlem Pilot Block Bldg 1 HDFC v Cordero* (196 Misc2d 36, 763 NYS2d 203 [Civ Ct NY Co 2003]); *Green Park Associates v Inman* (121 Misc2d 204, 205, 467 NYS2d 500, 501 [Civ Ct Kings Co 1983]). *Compare, Bay Towers Co v Hankinson* (22 Misc3d 1103[A], 2008 NY Slip Op 52594[U][Civ Ct Qns Co 2008]).

The HUD Handbook's annual recertification requirements include extensive and detailed notices and procedures which landlords ***must*** follow, with the emphasis intentionally placed on the word "must". For example, HUD Handbook Ch. 7, § 7-7(B), entitled "Description of Required Notices" states that owners "must provide tenants with the Initial Notice and subsequent reminder notices as specified below during the annual recertification process." Subsection 1 of § 7-7(B) covers the "Initial Notice" and includes the word "must" six times. Subsection 2 of § 7-7(B) covers the "First Reminder Notice" and includes the word "must" four times. Subsection 3 of § 7-7(B) covers the "Second Reminder Notice" and includes the word "must" three times. Subsection 4 of § 7-7(B) covers the "Third Reminder Notice" and includes the word "must" four times. Samples of these four notices are attached to the HUD Handbook as Exhibits.

By comparison, the required procedures to terminate assistance where one of the six listed circumstances have occurred are much less stringent. The Handbook requires just one notice, without providing a sample, provides simply a list of five items that "should" be included in that notice and states that the notice "should" be served in the manner stated in the HUD Handbook. According to the "Change-2 Transmittal" which can be found in the HUD Handbook between the cover page and the table of contents, the word "should" was substituted for the word "must" as part of the batch of changes that were made effective June 29, 2007.

"Should" and "must" necessarily have different meanings, with the former being advisory and the latter mandatory. As stated in the on-line Merriam-Webster dictionary, "should" expresses obligation, propriety or expediency, as in "you should brush your teeth after each meal", and "must" expresses a command or request, as in "you must stop". As explained

in *Talbot v Board of Education* (171 Misc 974, 980, 14 NYS2d 340, 346-347 [Sup Ct NY Co Special Term 1939]):

> Under the general rule of statutory construction words of command are construed as peremptory unless there is something in the act or surrounding circumstances to indicate a contrary intent. Where words in a statute are peremptory and used in contradistinction to permissive words in the same statute, it will be deemed that the legislative intent was to make such statute imperative. (Cf. *People ex rel. Sherrill* v. *Guggenheimer*, 28 Misc. 735; affd., 47 App. Div. 9.) And where the word "may" in a statute has been amended to the word "shall," the courts will construe the amended statute as mandatory. (*Rosenblum* v. *Gorman*, 21 App. Div. 618.) That exactly is the situation here.

See also New York C R Co v Donnelly (8 AD2d 65, 69-70, 185 NYS2d 874, 878-879 [4th Dep't 1959])(citing three different treatises that discuss the distinct meanings to be applied where the mandatory "shall" and the permissive "may" are used in different sections of the same statute or in different clauses or sentences in the same section or paragraph).

It is evident that HUD intends there to be a more elaborate and stringent set of requirements during the recertification process than for termination of assistance generally and in fact emphasized this by amending the relevant sections of its Handbook in June 2007 to substitute the permissive word "should" for the mandatory word "must" for the information to be included in the required 30-day notice and the method of its delivery.

While Petitioner put into evidence three notices it delivered to Respondent prior to terminating her assistance, the one that meets the requirements of the HUD Handbook was the second one, dated November 30, 2016, of which Respondent acknowledged timely receipt. The November 30 notice, which was both hand-delivered and mailed, adequately advised Respondent that she was being transferred to a specific 2-bedroom apartment – Apartment 5A at 1432 Crotona Park East – which was expected to become available by December 15, 2016 or January 1, 2017. The letter clearly notified Respondent that she had the option of remaining in her current apartment but that if she did so, as of February 1, 2017 she would lose her subsidy and have to pay the HUD approved market rent of $1415 per month.

The court finds the November 30 letter to be sufficient under the HUD Handbook as it provides Respondent with well over the minimum requisite of thirty days' notice as well as the following information: February 1, 2017 was the specific date as of which Respondent would lose her subsidy if she refused to move; Apartment 5A at 1432 Crotona Park East was the specific 2-bedroom apartment being offered; $1415 per month was the amount of rent Respondent would have to pay if she refused to move and lost her subsidy. The notice further invited Respondent to contact Site Manager Leslie Roman, whose contact information is included, if she had any questions.

That Respondent may not have received the first letter Petitioner sent in August 2016 is of no moment as she clearly received the November 30 letter which gave her approximately sixty days' advance notice, twice what is required by the HUD Handbook. That the second letter's deadline to move was later extended through February 28, 2017 in a third letter is also of no moment as Respondent had already received proper notice with just the timing and other details to be worked out through less formal communications. That the third letter reiterated the consequences of what would happen if Respondent did not accept the transfer only further put her on notice. Respondent's testimony that she was only given two weeks' notice which was not enough time to prepare to move was simply further evidence of her refusal to acknowledge the import of the November 30 letter.

Ms. Lora credibly testified that the language in both the November 30 and February 6 letters about further notification "as it gets closer to the move out date for you to come to the office to sign all the transfer paperwork and pick up the keys", did not mean there would be any further written notification which, in any event, is not required by the HUD Handbook. Notification in those later stages of the transfer process meant telephone calls to work out the details and Ms. Lora made clear that Petitioner works with tenants who must transfer, saying that "we want them to feel comfortable as much as possible." Respondent simply was not credible when she testified that she did not know that her subsidy had been terminated and that "nobody ever told me".

Respondent's claim that the proposed relocation apartment was a "dump house" and its condition was the reason she did not move was also unsupported and not credible. In her HP Action Petition filed on February 22, 2017 Respondent listed none of the conditions she claimed to have observed during her walk-through with Ms. Roman in early February 2017 - problems with the closets in both bedrooms, mold in the bathroom, a dislodged radiator and a "busted window" covered with a board[10] in one of the bedrooms. While Respondent testified that she took photographs during the walk-through with Ms. Roman in early February 2017, they were not offered into evidence. Respondent conceded that only two of the five conditions she listed in her HP Action Petition were still present on March 1, 2017 when the HP Action inspection was done. Further, it is evident from the Work Orders and the testimony of Petitioner's superintendent that repairs were being made during the time the apartment was empty and being readied for the next tenant. Petitioner's photographs taken around this time show the transfer apartment to be in excellent condition. The three HPD violations were all dismissed

[10] Respondent's conclusion that there was a "busted window" in the bedroom, based on her observation of a piece of plywood leaning against it, proved to be incorrect. Not only did the March 1, 2017 inspection report contain no violations for any window conditions, but Petitioner's superintendent credibly explained that the only thing wrong with the bedroom window was a balance that needed to be repaired; the plywood had been placed there to block light that was bothering a neighbor.

based on a certification received on April 20, 2017. The super testified that the new tenant who did move in has had no complaints.

If Respondent's complaints about the condition of the transfer apartment were made in good faith, she would not have refused to move but rather would have stayed in touch with Ms. Roman to monitor the repairs, ensure correction of the violations and effectuate as smooth a transition as possible. Instead, she testified that after her inspection of the apartment with Ms. Roman in early February 2017 she told Ms. Roman that she was not accepting the apartment. Further, rather than trying to resolve the issues, Respondent testified that upon returning the keys to Ms. Roman on March 1, 2017 after the HP Action inspection she did not speak with Ms. Roman about the repairs or anything else. Instead, Respondent's next communication with Ms. Roman was through her lawyer, who sent a letter on March 17, 2017 which simply stated that the lawyer had been retained "in regard to various issues involving [Respondent's] tenancy", with no indication that she wanted to address the alleged refusal to allow Respondent to add her nephew to her household and/or the violations in the proposed relocation apartment, the reasons Respondent now uses as her justification for refusing to move.

While Respondent claims Petitioner ignored her unproven request to add her nephew to her household as a pretext for requiring her to transfer to a two-bedroom apartment, the evidence instead establishes that Respondent exaggerated her complaints about the condition of the relocation apartment as a pretext for refusing to transfer out of her 3-bedroom apartment. Respondent's rambling, often nonresponsive and sometimes conflicting answers to questions only further undermined her credibility.

In sum, upon determining that Respondent was over-housed, Petitioner properly notified her that she would have to move to the relocation apartment or else lose her HUD subsidy and be responsible for paying the HUD approved market rent, which was $1415 at the time. Upon Respondent's failure to move, her subsidy ended, leaving her responsible to pay the HUD-approved market rent as stated in paragraph 19(b) of her lease and the relevant sections of the HUD Handbook.

CONCLUSION

Accordingly, the court grants the Petition and awards Petitioner a final judgment of possession and a money judgment for $27,110.62 against Respondent Chantay Williams, representing all rent owed through July 2019. This judgment is without prejudice to any claims Petitioner may have for rent and/or use and occupancy which accrued after July 2019. As there was no testimony regarding any "John Doe" or "Jane Doe", the proceeding is dismissed as against them. Issuance of the warrant of eviction is stayed five days, pursuant to RPAPL § 732(2). This constitutes the Decision and Order of this Court, copies of which are being mailed to the parties' respective attorneys forthwith. The parties may pick up their documents that were submitted into evidence as trial exhibits from the Part T Clerk (in either Room 409 or 410

at 851 Grand Concourse, Bronx, New York) within thirty days. If the exhibits are not picked up by March 18, 2020, they may be disposed of in accordance with Administrative Directives.

_____
Diane E. Lutwak, Hsg. Ct. J.

Dated: Bronx, New York
February 17, 2020

Attorney for Petitioner:

Valiotis & Novella, PLLC
31-10 37th Avenue, Suite 500
Long Island City, NY 11101
(718) 267-0300

Attorney for Respondent:

Law Offices of Karen Takach, PLLC
3311 Tiemann Avenue, Suite 2
Bronx, New York 10469
(646) 688-5209