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Forrester v. Sirulnick

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Forrester v Sirulnick
2021 NY Slip Op 50052(U)
Decided on January 28, 2021
Civil Court Of The City Of New York, Kings County
Stoller, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
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Decided on January 28, 2021

Civil Court of the City of New York, Kings County

<p>Marsha Forrester, Petitioner,</p> <p>against</p> <p>Aaron Sirulnick and DITMAS MANAGEMENT CORP,</p> <p>Respondent.</p>

1395/2020

For Petitioner: Marsha Forrester, pro se

For Respondent Sirulnick: Ira Cooper

For Respondent HPD: Julie Wilson

Jack Stoller, J.

Marsha Forrester, the petitioner in this proceeding ("Petitioner"), commenced this proceeding against Aaron Sirulnick and Ditmas Management Corp. ("Respondents") and the Department of Housing Preservation and Development of the City of New York ("HPD") pursuant to New York City Civil Court Act §110(c) seeking an order to correct violations of the New York City Housing Maintenance Code ("the Code") at her home at 5501 15th Avenue, Apt. 1J, Brooklyn, New York ("the subject premises"). Respondents interposed an answer. The Court held a trial of this matter on January 26, 2021.

HPD inspected the subject premises and found the following violations of the Code ("the Violations Found by HPD"): Motion granted as follows: "C" violations for infestations of mice and roaches, "B" violations for impermissible window gates, light fixtures in the ceilings of the bathroom and the foyer, and for plastering and painting defective surfaces in a bedroom and a closet in a private hallway, and "A" violations for the refitting of doors in the bathroom and a closet. [\[FN1\]](#)

Petitioner testified that she has had multiple violations in the subject premises going back to 2012; that she experienced mold in the subject premises; that Respondents would send workers to the subject premises, but that workers painted over the conditions rather than solved [\[*2\]](#) the underlying conditions; that the conditions caused health issues for her and her daughter; [\[FN2\]](#) that she complained to HPD by calling 311; that water she gets is dirty, brown, and smells bad; and that she noticed water pooling on the floors of the common areas of the building in which the subject premises is located ("the Building") even in the absence of rain.

Petitioner introduced into evidence a photograph taken in January of 2021 of a medicine cabinet that appeared to be rusted and stained; a photograph taken in January of 2021 of a radiator with a puddle of water next to it, which Petitioner testified leaked from the radiator; photographs taken in January of 2021 of a gap between Petitioner's bedroom floor and wall, where Petitioner testified mice come in; photographs taken in January of 2021 showing discoloration and cracks in tiles and grouting in the bathroom walls; a photograph taken in January of 2021 of the underside of the bathroom sink, which shows discoloration; photographs taken in June of 2020 of water on the floors of the common areas of the Building; and other photographs that corroborated the violations that HPD placed.

Petitioner testified on cross-examination that the water condition depicted in the photographs of the common area of the Building is not how the Building looks at the time of

the trial; that the water runs light brown and then runs darker brown the longer that it runs; that the water is not in that condition every day; and that the water did not run brown on the day that the HPD inspector was there.

A licensed mold assessor ("the Mold Assessor") testified that Petitioner retained her; that she came to the subject premises; that she experienced a pungent odor at the entrance of the Building; that that she observed standing water in a light bulb; that, in the bathroom of the subject premises; she observed mold growth on the tiles and the grouting; that the tiles were buckled and shifting in certain areas where the tub is; that she observed evidence of previous water damage in the ceiling, cracking plaster and paint, water intrusion in the bedroom, moisture in the bathroom, kitchen, and bedroom, water intrusion in the base molding and discoloration in the kitchen, and elevated moisture near a radiator; that she took surface samples of the bathroom tiles and grout with a swab to send to a lab; that the lab found fungal growth, to wit, an allergy spore; and that she recommends mold remediation in the bathroom where she took samples and in the kitchen and bedroom because she observed moisture there.

Petitioner introduced into evidence the report that the Mold Assessor generated shortly after her inspection of the subject premises ("the Report"), which stated that she inspected the subject premises on September 10, 2020. Petitioner also introduced into evidence the lab report from the swab samples that the Mold Assessor took in the subject premises. The Mold Assessor's recommendations, as per the Report, included a professional mold remediation in the bathroom, removal and disposal of a section of drywall in the ceiling to help locate moisture, and remediations in the bedroom and kitchen.

The Mold Assessor testified on cross-examination that she observed water intrusion in the ceiling and walls; that the water intrusion has more than one source; that she did not see signs of mold growth in the bedroom; that she nonetheless saw signs of water intrusion in the bedroom, and any moisture in porous areas means that there would be mold growth; that she does not know for sure that there is mold growth in the bedroom; that the samples in the other [*3] areas were enough to satisfy her that there is mold in the bedroom; that when mold is behind walls and hidden it is less unsafe, but if a newer layer exhibits the same damage then the mold is not hidden; that if the mold was encapsulated, she would not see water damage; that she recommends a probe; and that it is fair to say that without a probe there is no way to know if there is mold anywhere but bathroom.

The Mold Assessor testified on redirect examination that she took samples for mold in just the bathroom and the hallway because that was where she saw water coming into the light bulb fixture and that's where there was recent water damage.

No evidence in the record rebutted the violations HPD placed, Petitioner's photographs, Petitioner's testimony, the Mold Assessor's testimony, or the Report. While HPD did not place a violation for mold or for dirty water, HPD's failure to do so does not preclude Petitioner's cause of action. A lawful occupant may commence a Housing Part ("HP") proceeding against an owner if HPD "fail[s] to issue a notice of violation upon the request of the lawful occupant." N.Y.C. Admin. Code §27-2115(h)(1). An order to correct is therefore necessary. The only ambiguity is whether Respondents must follow the Mold Assessor's recommendation to remediate for mold in the rooms in the subject premises where the Mold Assessor did not take samples for testing.

A mold assessor may not remediate mold on the same property for which the mold assessor made a recommendation, Labor Law §936(2), *Gendell v 42 W 17th St Hous Corp*, 2018 NY Slip Op 31313(U), ¶ 9 n 5 (S Ct NY Co), the effect of which is to remove the incentive for a mold assessor to recommend mold remediation beyond what is necessary. Accordingly, a mold assessor's recommendations can be determinative. *See* Labor Law §946(1) (a mold remediator "shall" prepare a mold remediation work plan that, *inter alia*, "fulfills all the requirements of the mold remediation plan developed by the mold assessment licensee ") Even if the Mold Assessor did not test samples taken from the bedroom or the kitchen, her observation of the effects of moisture in those rooms, evidence buttressed by the photographs of leak conditions in the subject premises and the Building, support her conclusions regarding the rooms other than the bathroom. The Court finds the recommendation of probes to ascertain mold in the other rooms to be particularly prudent in this regard. Accordingly, the Court shall direct that Respondents retain a licensed mold remediator and the Court shall direct that the mold remediator shall follow the Mold Assessor's recommendations in the Report, which include work in rooms other than the bathroom.

Respondents therefore must correct not the only the Violations Found by HPD, but must also correct Petitioner's tap water runs brown, the condition of the medicine cabinet, the leaky radiator, and the gaps between Petitioner's bedroom floor and wall, which the Court finds to be "B" violations ("the Violations Found by the Court"), and the Respondent must remediate

for mold, which the Court finds to be a "B" violation. *See* N.Y.C. Admin. Code §27-2017.3. Only holders of mold remediation licenses may remediate mold, Labor Law §§931(2), 931(3), and the mold remediator must conspicuously display its mold remediation license at the work site on a mold project, Labor Law §931(4), which means that Petitioner is entitled to see the license of any mold remediator who gains access to the subject premises.

The Court sets out a schedule for work to be completed and deadlines below. If Respondents do not complete the work by these deadlines, then HPD or Petitioner may restore this proceeding for an award of civil penalties against Respondents and/or for contempt. Petitioner may move for this relief by order to show cause at the clerk's window on the second [*4] floor of the Courthouse located at 141 Livingston Street, Brooklyn, New York.

Accordingly, it is

ORDERED that the Court directs HPD to place "B" violations for the Violations Found by the Court, and it is further

ORDERED that the Court directs HPD to place a "B" violation for mold in the bathroom, and it is further

ORDERED that Respondents shall correct the Violations Found by HPD and the Violations Found by the Court, and it is further

ORDERED that Respondents shall correct all mold violations and mold conditions in the subject premises in compliance with the recommendations of the Mold Assessor set forth in the Report with a mold remediator licensed by New York State who shall display its license upon any inspection or remediation work in the subject premises, and it is further

ORDERED that Petitioner shall provide access to Respondents' mold remediator for an inspection on February 8, 2021 from 1 p m to 5 p m and then provide access for the correction of the violations and the remediation of mold on February 15, 2021, February 16, 2021, February 17, 2021, February 18, and February 19, 2021 from 9 00 a m to 5 00 p m , and it is further

ORDERED that if any worker on any access date between February 15, 2021 and February 19, 2021 does not arrive at the subject premises by 10 00 a m , Petitioner does not have to remain in the subject premises waiting for them, and it is further

ORDERED that Respondents shall complete correction of the "C" violations on or before February 19, 2021, correction of the "B" violations on or before March 1, 2021, and correction of the "A" violations on or before April 28, 2021, and it is further

ORDERED that on any default of this order by any party, that any party may move for any appropriate relief, including but not limited to civil penalties and contempt.

This constitutes an order of this Court

Dated: January 28, 2021

Brooklyn, New York

HON JACK STOLLER

J.H.C.

Footnotes

Footnote 1: A class "A" violation is "non-hazardous" pursuant to N.Y.C. Admin. Code §27-2115(c)(1); class "B" violation is "hazardous" pursuant to N.Y.C. Admin. Code §27-2115(c)(2); and a class "C" violation is "immediately hazardous" pursuant to N.Y.C. Admin. Code §27-2115(c)(3). *Notre Dame Leasing LLC v. Rosario*, 2 NY3d 459, 463 n.1 (2004).

Footnote 2: This testimony was admissible for Petitioner's state of mind, not for the truth of the matter asserted.

[Return to Decision List](#)