2021-03-22

Food First HDFC Inc. v. Turner

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART Q

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FOOD FIRST HDFC INC.,

Petitioner,

Index No. 78894/2019

-against-

YOLANDA TURNER,

DECISION/ORDER

Respondent.

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Present: Hon. Jack Stoller
Judge, Housing Court

Food First HDFC Inc., the petitioner in this proceeding ("Petitioner"), commenced this summary proceeding against Yolanda Turner, the respondent in this proceeding ("Respondent"), seeking a money judgment and possession of 327-329 Franklin Avenue, Apt. 3D, Brooklyn, New York ("the subject premises") on the basis of nonpayment of rent. Respondent interposed an answer containing, *inter alia*, counterclaims in harassment and breach of the warranty of habitability. The Court granted Respondent's motion to dismiss the petition. The Court proceeded to trial on Respondent's counterclaims on December 14, 2020, January 22, 2021, and February 4, 2021 and adjourned the matter for post-trial submissions to March 8, 2021. During the course of the trial, the Court also granted Respondent's motion to hold Petitioner in contempt of Court to the extent of setting the motion for a hearing, which the Court held jointly with the trial.

Background

Petitioner originally commenced this proceeding by filing a notice of petition and petition with the Court on September 23, 2019. Respondent, while pro se, answered on October 10, 2019, raising an affirmative defense of breach of the warranty of habitability. Respondent then

retained counsel who moved by a notice of motion served on Petitioner on December 10, 2019 to amend Respondent's answer to include, *inter alia*, counterclaims sounding in rent-impairing violations, breach of the warranty of habitability, harassment, and attorneys' fees. By an order dated January 23, 2020, the Court granted Respondent's motion to amend her answer and deemed the answer served *nunc pro tunc*. Respondent then moved for summary judgment on her affirmative defense sounding in rent-impairing violations. The Court granted Respondent's motion by an order dated October 5, 2020, according to which the Court held that Respondent's successfully proved an entitlement to relief pursuant to MDL §302-a, the effect of which was to bar Petitioner from collecting rent for the period from January through July of 2020. Food First HDFC Inc. v. Turner, 69 Misc.3d 1202(A)(Civ. Ct. Kings Co. 2020).

The parties stipulated that the parties are in a landlord/tenant relationship with one another, that Respondent's rent was $1,048.29 from at least June of 2019 through January of 2020 and then increased to $1,084.79 as of February of 2020, and that rent had not been paid from June of 2019 through July of 2020.

By an order dated December 14, 2020, the Court directed Petitioner to correct violation #13895379, for a broken or defective shower body in the subject premises ("the Shower Violation") on or before December 21, 2020. The order to correct set dates for access to the subject premises from December 18, 2020 through December 21, 2020 from 9 a.m. to 5 p.m., with workers to arrive by 11 a.m.

Contempt

While the Court heard evidence from both parties on Respondent's contempt motion, Respondent's post-trial memorandum of law states that Respondent is withdrawing so much of her motion as seeks an order to correct the Shower Violation, as Respondent states that the

Shower Violation has been corrected as of February 18, 2021. Respondent does not withdraw her motion for contempt, however.

Penalties imposed on a contemnor serve of the purpose of coercion of compliance with a Court order, Dep't of Hous. Pres. & Dev. v. Deka Realty Corp., 208 A.D.2d 37, 42 (2nd Dept. 1995), underscoring the proposition that a contemnor has the opportunity to purge contempt. Ruesch v. Ruesch, 106 A.D.3d 976, 977 (2nd Dept. 2013). Accordingly, even assuming *arguendo* that Petitioner had previously been in contempt of Court, the only purpose of a civil contempt sanction after obedience with the Court's order would be to punish Petitioner. Punishment, however, is the purpose of criminal contempt, not civil contempt. Mollah v. Mollah, 136 A.D.3d 992, 994 (2nd Dept. 2016). Respondent moved for civil contempt, not criminal contempt. The Court must hold a movant for contempt to the strictest standards. In re Berkon, 180 Misc. 659, 661-62 (S. Ct. Kings Co. 1943), *rev'd. on other grounds,* 268 A.D. 825 (2nd Dept. 1944), *aff'd,* 294 N.Y. 828 (1945), 2701 Grand Assocs. LLC v. Encarnacion, 64 Misc.3d 1229(A)(Civ. Ct. Bronx Co. 2019), N. Fork Bank v. Reed, 15 Misc.3d 1117(A)(Dist. Ct. Nassau Co. 2007), Bank Leumi Tr. Co. v. Taylor-Cishahayo, 147 Misc.2d 685 (Civ. Ct. Queens Co. 1990). Accordingly, the Court denies Respondent's contempt motion as moot.

Trial record: general maintenance issues and harassment allegations

A community coordinator ("the HPD coordinator") for the Department of Housing Preservation and Development of the City of New York ("HPD") testified that the building in which the subject premises is located ("the Building") went into the Alternative Enforcement Program ("AEP") as of January 31, 2020;[1] that he had been making arrangements with Petitioner

[1] The NYC AEP Program is an initiative whereby the "worst" properties with the most housing violations in New York City are identified and monitored. In order to be removed from the

to inspect the Building, coordinating access dates between Petitioner and tenants on many occasions; that Petitioner did not want a representative of HPD present for the access dates; that Petitioner at times was nonresponsive in setting up access dates; and that he has never been to the subject premises.

The HPD coordinator testified on cross-examination that an HPD inspector was at the Building on December 12, 2020; that the person he understood to be the owner emailed him a number of times regarding problems with getting access; and that he did not give notice when he would inspect the Building.

Petitioner introduced into evidence the HPD coordinator's email communications with someone who works for Petitioner on September 21, 2020, according to which Petitioner's representative is complaining that Petitioner will not coordinate with HPD, that tenants refuse access to Petitioner, that the tenants call HPD instead, that he is not aware of HPD's contractor repairing the shower, and that he knows that HPD placed a new violation.

HPD's construction project manager ("the HPD construction manager") testified that she monitors how violations get corrected; that she has been working on the Building; that HPD did work in the subject premises to stop a leak going down to the apartment below the subject premises; that when she inspected, there was no such leak in October; that HPD's contractor could not shut off the water to do the work because the only place in the Building where water could be shut off was the basement, which was locked; that she called Petitioner, who asked for an email; that she let the HPD coordinator know about that; and that she sent a request to HPD

program, 80% of hazardous violations must be removed. 26 Regal LLC v. Longfellow Ventures LLC, 2014 N.Y. Slip Op. 33402(U), ¶ 2 n.1 (S. Ct. Bronx Co.).

for an access warrant. The HPD construction manager testified on cross-examination that she had not previously asked for access before she called for it.

Respondent testified that she is a corrections officer; that her workplace is on high alert because of the COVID-19 pandemic currently raging through New York and the world; that at her workplace she is in contact with five to eight hundred people a day; that she is responsible for physically screening inmates for COVID-19; that there are now COVID-19 outbreaks in her workplace, with 93 staff members out with COVID-19 and 460 inmates so infected; that she is using her personal leave to testify at trial; that when she runs out of leave she does not get paid for days off; that she was ill earlier in the year; that she had to take off a lot of days for personal matters like Court; that she has lived in the subject premises for twenty years; that her son is twenty years old; that her son is in the army on active duty, so he comes home once or twice a year; that when she first moved in, conditions were better than they are now; that in the last seven or eight years the building manager has resisted fixing issues in the Building; that she notified Petitioner by phone of conditions in need of repair; that she took days off of work to give access; that Petitioner would set up separate access dates for inspection and for repairs; and that Petitioner refuses to give any appointment for less than an eight-hour window even if Petitioner just inspects.

Respondent introduced into evidence a stipulation in this matter dated November 20, 2019, which provided, *inter alia*, that Respondent would provide Petitioner with access to the subject premises on December 5, 6, 12, and 13 of 2019, from 9 a.m. to 5 p.m., with workers to arrive by 12 noon. Respondent testified that she took off from work on December 5 and stayed at home; that no workers came to the subject premises; that she called Petitioner; that the super did not say anything to her; that, again on December 6, she waited at home; that she heard

someone who works for Petitioner in the hallway with someone fixing things; that they went to an apartment on a higher floor and said they might get to her when they finish the other apartment; that they did not show up until 3:30 p.m.; and that they came, looked at what needed to be done, made an assessment, and left. Respondent introduced into evidence a "work order" that she signed on December 6, 2019. Respondent introduced into evidence a letter from Petitioner dated December 5, 2019 that she testified that she found posted on her door. The letter said that Petitioner sent a worker to the subject premises on December 5 and 6 from 10 a.m. to 10:30 a.m. and that Respondent did not give them access, at least until 3:30 p.m. This letter says that Petitioner will pursue eviction if Respondent does not give access. Respondent testified that this letter, along with other letters that Petitioner posted on her door about nonpayment of rent, are embarrassing; that every time Petitioner engages in a kind of service she receives a letter claiming that she denies them access; and that it is nerve-wracking to be threatened with eviction.

Respondent testified that the room in the Building for tenants to leave garbage in is in the basement of the building; that she is afraid to go down to that room because there is no proper lighting there; that the area has blind spots; that there is no phone service in that room; that there are plumbing backups that render the area unclean; that she has witnessed people down there, aside from porters, including a homeless woman, who is familiar in the neighborhood, sleeping there; that Respondent had a practice of leaving trash at the top of the stairs leading down to the trash room; that, on or about November 14, 2019 she did just that; that she then went out to a store; that when she came back from the store, her trash was spread in front of the door of the subject premises, half in a garbage bag and half out; that she picked it up took it downstairs; that a porter whose name she does not know but who she had seen in the Building before told her that

she is supposed to bring trash downstairs; that Petitioner had never before had problems with her placing the trash behind the door before; that this porter started yelling at her, saying that he would call Petitioner about her; that she called police because the porter got aggressive with her; that someone from Petitioner's office told her that there was nothing that they could do; that Petitioner had sent this porter to the subject premises with a snake when she had a toilet problem; that they were a foot and a half away from each other; she is four-feet-ten-inches tall and he is five-feet-ten-inches tall; that the porter said that she would be out of the subject premises before he would be out of a job; that she called Petitioner immediately; and that Petitioner said to call the police and did not do anything else.

Respondent introduced into evidence a stipulation dated December 19, 2019 that provided, *inter alia*, that Respondent was to provide Petitioner's workers with access on December 30, 2019, January 2, 2020, and January 3, 2020 from 9 a.m. to 5 p.m., with workers to arrive by 12 noon. Respondent testified that the super came on December 30, 2019 with a long list of repairs and did work; that on January 2, 2020 Petitioner sent to the subject premises the porter who she had the experience with described above; that she refused to allow this porter to come into subject premises and told Petitioner so; and that Petitioner then sent the super. Respondent introduced into evidence a letter from Petitioner dated January 2, 2020 which said that workers came to the subject premises at 9 a.m. and that she did not let them in.

Respondent testified that if she is not home she asks a neighbor or a cousin to provide access but she always gets a letter claiming that she denied Petitioner access; that Petitioner is only open during regular business hours, with no super or porters available other than that; and that once she retained counsel, Petitioner got more flexible about doing work on a Saturday.

Respondent testified on cross-examination that she knows a porter named Mike who is a different porter from the one who confronted her; that Mike comes on the 18th; that Mike is very polite to her; that the police said to call Petitioner and make an agreement about the porter; that she contacted Petitioner and was told that someone would get back to her; that she had another incident, not with the same person; that she does not know the name of the other person; that she emailed Petitioner about that November incident; that she did not address a particular person for Petitioner; and that the vast majority of her communications with Petitioner were by phone.

Respondent's neighbor testified that she lives in the Building; that she knows Respondent; that the subject premises is one floor down from her and not directly underneath her, but that she can see the subject premises from the staircase; that she is a personal trainer; that the effect of the pandemic has been to reduce the amount of work she has, so she has been home a lot more than usual; that she can give access to neighbors' homes if needed; and that she has given access for Respondent in the last few months.

Respondent's neighbor testified on cross-examination that when she provided access to the subject premises, she waited in her own apartment, not the subject premises, because she has small children, the youngest of whom is immuno-compromised; that, several months ago, she heard an incident between Respondent and a porter; that she was in her apartment at that time; that Respondent was in the hallway; that the porter was screaming at her; that employees change often; that this was a porter she had seen before; and that she did not recall if she has seen him recently.

Petitioner's assistant property manager ("the Assistant Property Manager") testified that she sent letters to Respondent to notify Respondent of Petitioner's position that Respondent denied Petitioner access, although the Assistant Property Manager did not have personal

knowledge of the denial of access. Petitioner introduced into evidence the following letters: one dated December 13, 2019, which stated that Respondent did not provide access on December 5, 6, 12, and 13 of 2019; one dated January 2, 2020, which stated that Respondent did not provide access on January 2, 2020; one dated February 7, 2020, which stated that Respondent did not provide access on February 7, 2020; one dated March 15, 2020, which stated that Petitioner would not replace Respondent's stove because it works and that Petitioner inspected the subject premises on March 13; one dated July 19, 2020, which requested access; one dated September 24, 2020, which stated that Petitioner cannot shut off water in the Building without notice to tenants; one dated October 23, 2020, which requested access; one dated November 4, 2020, requesting access to work on the shower body; and one dated November 27, 2020, which stated that Respondent did not provide access on November 24, 2020. The Assistant Property Manager testified that Petitioner placed Respondent on a schedule for repairs when there was a stipulation from Court and that she dealt with Respondent herself less than five times in one year.

The Assistant Property Manager testified on cross-examination that the letters threaten Respondent with the commencement of a holdover proceeding if Respondent does not give access; that she only writes letters based on representations from her supervisor; and that she prepares documents called work orders which are intended to memorialize repairs being done. After Respondent showed the Assistant Property Manager a work order in evidence saying that Petitioner completed work on December 6, 2019, the Assistant Property Manager testified that even though work was done on December 6, 2019, not all of the work was done; that that was why she sent a letter threatening her with eviction for failure to provide access; that she is not aware that a holdover proceeding can result in eviction; that she receives HPD violations by email; that she called Respondent when she heard about HPD placing a violation; that Petitioner

serves more than 100 tenants; that she always calls tenants before sending a letter; that before sending a vendor to correct an HPD violations, Petitioner's practice is to conduct its own inspection first; that she knew about the pendency of this proceeding and that it was about access to some extent; and that she would not ask Petitioner's lawyer to set up an access date.

Specific conditions

Shower body

Respondent introduced into evidence a "C" violation dated February 28, 2020 and the Shower Violation, a "B" violation dated November 12, 2020, both for a defective shower body.[2] HPD's issuance of a violation directs an owner to certify to HPD under oath that the owner has corrected the violation. N.Y.C. Admin. Code §27-2115(o)(2). Respondent introduced into evidence a certification Petitioner submitted to HPD sworn to November 27, 2020, according to which a corporate officer of Petitioner averred that Petitioner corrected the shower body violation on November 25, 2020.

The HPD coordinator testified that HPD had a contractor go to the subject premises to make repairs on the shower body and bathroom tiles there in late 2020; that, in advancement of these repairs, he called and emailed Petitioner about getting access to the cellar of the Building to shut off the water in the Building; and that HPD inspected and found that Petitioner had not in fact corrected the Shower Violation, rendering Petitioner's certification false, which HPD's records reflect as of December 13, 2020.

The HPD construction manager testified that she has visited the subject premises one time, on December 18, 2020 to check to see if the owner's plumber did the work; that nothing

[2] A 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 N.Y.3d 459, 463 n.1 (2004).

had changed when she was there; that she took photos; that water did not come out of the shower head; that she inspected water pressure in other apartments in the Building; that the water pressure was good in other apartments; that there was also water pressure in the sink, the tub spout, and the kitchen in the subject premises; and that the spout body diverter, which diverts water from the tub spout to the shower head, does not work.

The HPD construction manager testified on cross-examination that nothing else had to get done regarding the shower body; that the shower head was still in place when she last visited; that there was very little water pressure; that she is an architect; that she studied plumbing although she is not a specialist in plumbing; that a shower body has a lot of components; that a shower head is a part of a shower body; that the trim is a decorative part of the shower body; that the shower body is located behind the tiles; that a shower head not working is not necessarily indicative of a shower body; that the shower body provides water to the spout and the shower head, which occurs behind the tiles; that if there was a problem with the shower body one would not be getting water or control of the temperature of the water either; that she did not find that to be the case; that to fix what is wrong with the shower head, you would have to fix the shower body; that water pressure was consistent throughout different apartments and controlled by the City, not Petitioner; that the shower handle is a part of the shower body; and that the shower body is inside the tile. The HPD construction manager testified on redirect examination that the shower was not usable; that water pressure is not the issue in subject premises; and that an inspector, not her, places the violation.

An inspector for HPD ("the HPD inspector") testified that he was in the subject premises in December to inspect the shower; that he saw that the shower was not working; and that he had seen the shower previously and that it did not work at that time either. The HPD inspector

testified on cross-examination that he used to be a maintenance worker, work which entailed plumbing; that a shower body supplies water to faucets in the shower, including a spout and a shower head; that water came out of the spout but not the shower head; that the shower head is not a part of the shower body; that anyone could change a shower head without plumbing experience; that stems and handles are a part of the shower body in front of the tiles; that the rest of the shower body is behind the tiles; that only a certified plumber can replace a shower body, which requires removal of tiles and drywall; that water came out of the spout, just not out of the shower head; that the water pressure in other apartments seemed fine and was consistent in both apartments; and that the shower body controlled the spout. The HPD inspector testified on redirect examination that he had been in maintenance since 1987; that he hired a licensed plumber when he worked maintenance; and that a licensed plumber is not required to fix the shower head. The inspector testified on recross examination that the shower head and shower body are separate and distinct parts of a shower.

Respondent testified that she tried to avail herself of the AEP program to get her shower working again; that she understood that AEP could not change the shower body because they could not get access to shut the water to the Building off; that the water pressure is very low; that the water in her tub does not get as hot as the rest of the water in subject premises; that she does not now have a stopper in the tub, so she takes a bath; that because of her exposure to viruses during the pandemic, she wants a shower; that using a bath takes a longer amount of time; that sometimes she only has a six-hour swing back from work; that it is hard to have a relationship with someone when you cannot shower; that this condition started a week after AEP came; that AEP said that the shower body needs to be replaced; that on December 18, 2020 she stayed home; that Petitioner placed a notice saying that there would be no water between 9 a.m. and 11

a.m. that day; that the porter named Mike and another man who said he was a plumber came to subject premises that day; that they inspected; that the plumber called HPD names; that the plumber left and came back an hour and a half later; that she opened the door and asked for the plumber's license; that the plumber told her that she had no right to see his license; that the plumber left; that she asked the plumber to come back; that the plumber said something to the effect of, "I'm not dealing with you" and used profanity in a way that was loud enough to rouse Petitioner's neighbors; that the porter apologized; that Petitioner refused to come back the next day; that she still does not have a shower; that she called Petitioner; that the response was that they would get to it; that she had called Petitioner three times between 9 a.m. and 11 a.m. on December 21; that she heard that Petitioner was not coming; that at 1:30 she went to work; that she made arrangements with Respondent's neighbor to give Petitioner access and she let Petitioner know by phone that Respondent's neighbor would be available; and that Petitioner accused her of denying access on these dates.

Respondent introduced into evidence a notice dated December 18, 2020 from Petitioner saying that Respondent harassed the plumber and put him on video without the plumber's consent; that the shower body did not leak; and that the water pressure in the subject premises is the same as throughout the Building. Respondent introduced into evidence a video recording of her shower which depicts weak water pressure when the shower is turned on.

Respondent testified on cross-examination that HPD installed a new shower head in October of 2020; that she did not install new shower head; that she thinks that the shower head had been changed at some point in the twenty years she has been living in the subject premises; that she does not remember who did that; and that a licensed plumber came when AEP came.

Respondent's neighbor testified that, on November 24, she was ready to give Petitioner access to the subject premises to get a shower fixed; that no one showed, no one called, and no one knocked on the door; that, in December she heard a man's voice loudly yelling, "I'm not going to fix it;" and that she asked Respondent if she was okay.

Over opposition, the Court granted Petitioner's application to qualify a plumber as an expert witness.[3] The plumber testified that on December 18, 2020, he had been assigned to fix a shower body located behind a wall at the subject premises; that he had never been to the Building before that day; that he arrived at the Building at around 9 a.m.; that he tested out particular parts that he was there to fix; that he tested the shower body; that a "shower body" is installed behind a wall; that hot and cold water go through a cartridge inside of it that regulates and mixes hot and cold water; that piping is not behind the wall, but that is not the shower body; that he turned on hot water and cold water; that he turned on the spout to the tub; that water was coming out just fine; that he diverted water from the spout; that most shower bodies do not have a diverter on them to control the flow of water for a shower head or for a bathtub; that on a shower spout there is a little pin that you pull up; that once you pull up the pin, water is diverted into shower head; that when he did that the water came out as it was supposed to; that the shower head is different from the spout; that the difference is that it makes water come out from the shower head not as powerfully so that it does not hit one's skin hard and it sprays out more on

[3] Although the plumber did not have a master plumber's license, he testified that he had over twenty years' experience in plumbing in New York City in residential, commercial, and industrial buildings, on city and federal projects, that he is certified in fire watch, that he is licensed by the New York City Department of Buildings ("DOB") for gas work, that he has worked on HPD violations for around ten years, that he has run different kinds of pumps, water lines, gas lines, and trim work, and that he has worked on the installation of shower bodies in residences for ten years, entailing running drainpipes and copper pipes. See Price by Price v. New York City Hous. Auth., 92 N.Y.2d 553, 559 (1998)(an expert may be qualified without specialized academic training through "[l]ong observation and actual experience").

angles so it covers your whole body; that that pin is not a part of the shower body; that that is a part of the trim; that it is outside the wall, which is more of a preference; that the term "trim" means it is a finish; that it is basically just for the piping to look good; that it is something that you put on the end of it; that you do not need it to take a shower; that the parts of the trim are located outside of the wall; that any part of the trim is not considered part of a shower body; that he tested the shower head while he was there; that the shower head is a part of the trim part of the finish work; that it is outside the tiles above your head when you stand up; that it is not a part of the shower body; that the shower head and the shower body are distinct parts; that he tested the shower head and other parts of the trim on December 18; that he tested the water flow; that hot and cold water came out; that the super was there; that everything worked; that he did not do anything with regard to water pressure; that cold and hot water comes out according to what the City provides; that he tested out two other apartments in the Building, one in the apartment right below the subject premises and another next door to the subject premises; that all three apartments had the same water pressure for both the hot and cold water; that water pressure is the measure of water coming into the Building; that a landlord can sort of control water pressure; that he found that water pressure in the Building overall was alright; that the water pressure is a little lower than in some areas depending on the location; that he cannot alter water pressure, nor could Petitioner; and that there is nothing wrong with the shower body in the subject premises.

Petitioner introduced into evidence the plumber's record of work having been done in the subject premises, which contains a notation, "in 3D inspected shower body. Nothing is wrong with it – water running the same in 2B and 3B as in 3D."

Respondent introduced into evidence an affidavit that the plumber executed in the matter Department of Housing Preservation and Development of the City of New York v. Food First

HDFC Inc., Index #309689/20 (Civ. Ct. Kings Co.). Paragraph 9 of that affidavit avers that the shower head would on occasion not fully operate. The plumber testified on cross-examination that a shower head is a preference; that you do not need a shower head to take a shower; that a pipe sticking out of the wall is all that you need; that the shower head worked all the time on that day; that the water pressure is not that great as opposed to spout; that the shower head has a restriction so you do not get hit with water; that if a shower head is clogged with debris it does not work; that the shower head does not work because it does not have great pressure in the Building; that he thought that he wrote about low water pressure in his work record, although he did not; that he did not open the wall; that he tested the shower body and shower head by turning on the water and pulling the spout; and that there is no other diagnostic testing. The plumber testified on redirect examination that he does not have to open a wall to test a shower body and that he does not know who installed the shower head.

Petitioner's supervisor for the Building ("the Building Supervisor") testified that he has worked for Petitioner for about fourteen years; that he knows the Building very well; that he has been to the subject premises a couple of times, including in 2020; that he has seen the shower there; that he knows what a shower head is; that a shower head is a single piece; that the shower heads that Petitioner installs are one single piece; that the shower head in the subject premises is like a telephone with a wire; that Petitioner does not install those kinds of shower heads because they drip on floors; that he does not know who installed the shower head; and that he does not know how long it had been there.

The Building Supervisor testified on cross-examination that there could be 14 buildings in his scope with at least 350 units, if not more, altogether; that he does not inspect apartments every day; that he inspects a lot; that he has been to the bathroom in the subject premises before;

that he did not recall the date of a prior inspection about a shower; that Respondent would not let him in; that Respondent said that she did not put in a complaint about a shower, but that the City did; that that is when he noticed the nonconforming shower head; that this was after the plumber inspected; that he did not see that the shower head was leaking; that he turned it on; that they came in with the plumber; that Respondent said that they could not come in except with a licensed plumber; that HPD said that the shower body needs to be fixed; that he knows that HPD attempted to fix it in September of 2020; that he told HPD that he would fix the shower body; that he would not let HPD into the basement to shut the water off because HPD would have just shut the water down without giving occupants of the Building some warning that they would shut the water off; that normally Petitioner puts notices up in the Building to let occupants of the Building know ahead of time that Petitioner would shut the water off; that he is not aware of HPD replacing a shower head; and that he is not a licensed plumber. The Building Supervisor testified on redirect examination that if you do not warn tenants that you will shut the water off, a tenant could be in the middle of bathing or cooking when you shut the water off.

Testimony not only from Petitioner's witnesses, particularly the Building Supervisor and the plumber, but Respondent's witnesses as well, including the HPD construction manager and the HPD inspector, drew a distinction between a shower body, for which HPD placed a violation, and a shower head. The preponderance of the evidence, particularly the testimony of these four witnesses, shows that the problem with Respondent's shower resulted from Respondent's shower head and not the shower body. The Building Supervisor testified that the shower head in the subject premises was not the type that Petitioner provided. Respondent's testimony as whether she changed the shower head was equivocal, but is consistent enough with the Building

Supervisor's testimony that the Court draws the inference that Respondent effectuated the change in the shower head.

When a tenant's "misconduct" causes any condition otherwise constituting a breach of the warranty of habitability, the tenant shall not be entitled to a rent abatement. RPL §235-b. Respondent's change of the shower head is not "misconduct." However, if a tenant causes a violation, can a tenant obtain a rent abatement for the violation? The Court finds instructive that, in other contexts, the New York State Division of Housing and Community Renewal ("DHCR") will not penalize a landlord with a rent reduction order for conditions that tenants themselves cause. Compare Yonkers Garden Co. v. N.Y. State Div. of Hous. & Cmty. Renewal, 63 A.D.2d 679 (2nd Dept. 1978)(a landlord's vigorously-asserted — and apparent good-faith — argument that tenants that caused a problem forestalled the effective date of a rent reduction order until after an inspection confirmed the deprivation of services); Bobadilla v. N.Y. State Div. of Hous. & Cmty. Renewal, 2004 N.Y. Slip Op. 30349(U)(S. Ct. N.Y. Co.), Matter of Avery v. N.Y. State Div. of Hous. & Cmty. Renewal, 2 Misc.3d 1011(A)(S. Ct. Kings Co. 2004). See Also LGS Realty Partners LLC v. Kyle, 43 Misc.3d 1220(A)(Civ. Ct. N.Y. Co. 2014) (while a tenant's actions in taking down the walls, ceilings, and kitchen of an apartment cannot be considered "misconduct" for purposes of RPL §235-b, such action caused the apartment to be in substantial disrepair by commencing renovations and then halting them as the endless litigation between the parties went forward). On this record, equity does not permit a rent abatement for the condition of the shower.

Vermin infestation

Respondent introduced into evidence "C" violations dated April 5, 2019 and February 28, 2020 for roach infestations.

The HPD inspector testified that he works with the AEP program; that he has been to the Building more than five times in the past year; that he has seen worse in terms of vermin; that he could not remember if there was vermin in the Building; that the common area of the Building was clean; and that he visited the subject premises at some point in the last year, but not in the last month.

Respondent testified that there was a rat infestation in the Building; that rats were running in and out through the holes; that the stove was not working for a long time before the commencement of this case; that she had been notifying Petitioner for a long time; that Petitioner finally sent someone out; that the stove is still delayed turning on by ten or fifteen minutes, but it works enough for her to cook; that she can still smell an odor like urine when she cooks from when rats infested the area; that a roach infestation, which she had not previously experienced, was really bad; that roaches were on the food and the couches; that she had to get rid of a kitchen aid toaster crockpot; that she did not store food in the subject premises unless it was in the freezer or unless it was canned because she could not keep food without roaches being all over it; that more than once roaches would crawl on her, like when she was watching television; that one night she woke up to a roach crawling on her nose; that she tried to get her own exterminator; that she had roach bites on her arm; that an exterminator had been scheduled to come to the Building on the afternoon of first Thursday of each month; that she would have to take a day off of work to let the exterminator in; that there was no exterminator or sign-up sheet in April of 2019; that she would get an exterminator for six or seven months; that the roach problem has diminished; that she herself had someone caulk the holes where rats could get in; that she can hear mice in the walls, although she does not have any in the subject premises; and that roaches and mice were a problem up until October of 2019.

Respondent testified on cross-examination that the vermin infestation has not been remedied; that there is not a lot of vermin; that there is a sign-up sheet now that is available to all tenants free of charge; that she has availed herself of that; that the exterminator stopped coming in the summer but they came in the last three months; that she likes the company that comes now in part because they are good about letting her know about the times that they will come; that the roach problem was bad around 2020; and that she does not have the problem to the same extent.

Respondent's neighbor testified that the Building is poorly taken care of; that the smell when you first walk in is not pleasant; that there is almost no mopping and sweeping; that there are no lids on garbage bins; and that there is vermin in the common areas.

The "C" violation for vermin, first placed in 2019, is prima facie proof of the condition, MDL §328(3), and moreover is more probative of the condition than the memory of the HPD inspector. Subpoenaed records in evidence form HPD not only show that HPD gave Petitioner notice of the violation dating back to April of 2019, but they also show a certification from Petitioner dated May 8, 2019 claiming that Petitioner corrected the violation, which compels the conclusion that Petitioner had notice.

The aforementioned certification notwithstanding, Respondent testified to an ongoing, severe infestation. No witness of Petitioner's rebutted Respondent's testimony that Petitioner did not correction the violation in 2019, and Respondent's testimony to this point moreover coheres with a subsequent "C" violation for vermin infestation placed in 2020. The preponderance of the evidence therefore shows that Respondent endured this condition at least as of April of 2019 through the end of 2019 – although Respondent expressed satisfaction with a new exterminator that Petitioner subsequently hired in 2020.

A failure to give access is a defense to a cause of action for a rent abatement, Fifty-Seven Assoc., L.P. v Feinman, 30 Misc.3d 141(A)(App. Term 1st Dept. 2011), Yorkville 82, LLC v. Ruiz, 20 Misc.3d 128(A)(App. Term 1st Dept. 2008), but it is in the nature of an affirmative defense, NYCHA Coney Island Houses v. Ramos, 41 Misc.3d 702, 713 (Civ. Ct. Kings Co. 2013), so Petitioner bears the burden of proving that Respondent denied access. Neither the Building Supervisor nor the plumber, the only witnesses of Petitioner's who have even attempted access to the subject premises, testified that Respondent denied them access to the subject premises. While the Assistant Property Manager testified to sending Respondent a raft of letters alleging denial of access, she had no personal knowledge that Respondent denied any worker access. Even assuming *arguendo* that letters alleging a denial of access were admissible for the truth of the matter asserted therein, a number of factors deprive the letters of reliability. The Assistant Property Manager stated in a letter that Respondent denied access on December 6, 2019, although a work order in evidence showed that Petitioner's workers were in the subject premises on December 6, 2019. The Assistant Property Manager stated in a letter that Respondent denied access on November 24, 2020, although Petitioner's certified to HPD on November 27, 2020 that it corrected a violation on November 25, 2020, meaning that either the certification was untrue or that Respondent's ostensible denial of access on November 24, 2020 had no effect on Petitioner's ability to correct a violation. Petitioner also did not clarify why it chose to pursue disputes over access by letters Petitioner sent directly to Respondent rather than through attorneys in contemporaneous litigation over the very subject matter Petitioner covered in its letters to Respondent, particularly when the involvement of counsel for both parties could have foreseeably facilitated access. On this record, Petitioner does not meet its burden of proving by a preponderance of the evidence that Respondent denied Petitioner access.

Respondent is therefore entitled to a rent abatement on her counterclaim sounding in breach of the warranty of habitability.

A rent abatement is expressed with reference to a rental obligation. 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). As the amount of rent in the record, as per the stipulation between the parties, goes back to June of 2019, the Court shall award a rent abatement back to June of 2019. However, as the Court has previously awarded Respondent a judgment on her counterclaim sounding in rent-impairing violations pursuant to MDL §302-a, Respondent bears no rent liability from January through July of 2020 and therefore no additional rent abatement can lie for those months. Cf. Burgos v. Harry Realty LLC, 38 Misc.3d 147(A)(App. Term 1st Dept. 2013)(in the absence of a lease with a rental amount, the Court does not have a basis upon which to award a rent abatement).

Respondent's monthly rent from June through December of 2019 was $1,048.29. Respondent's aggregate rent liability for those seven months was $7,228.03. The Court finds that the infestation Respondent described diminished the habitability of the subject premises by 33%. Compare Hillside Place, LLC v. Lewis, 29 Misc.3d 139(A)(App. Term 2nd Dept. 2010)(upholding a 15% abatement for a vermin infestation), 501 N.Y. LLC v. Anekwe, 14 Misc.3d 129(A)(App. Term 2nd Dept. 2006)(awarding a 40% abatement for vermin infestation). By the time that Respondent again became liable for rent, in August of 2020, the preponderance of the evidence shows that the new exterminator had abated the problem. Thirty-three percent of $7,228.03 is $2,421.55.

Intercom/building security

Respondent introduced into evidence "B" violations dated April 5, 2019 and February 28, 2020 for a defective intercom. Respondent testified that she has had missing packages because the front door to the Building is broken downstairs; that the intercom system broke; that neighbors were leaving the front door to the Building open; that she would see homeless people inside the Building and in the room where tenants placed their garbage; that she pays a service to receive her packages; and that Petitioner fixed the buzzer in December of 2020.

Respondent testified on cross-examination that the buzzer is still not working; that she does not know who vandalized it; that she saw people use a credit card to open the front door of the Building; that she never saw people force their way through; that she thinks that there is an open violation for that condition; and that the bell works but the door is defective.

Respondent's neighbor testified that the doors at the main entrance are impaired; that the first door does not shut, which is visible from the street; that a second door that gets you into the Building, beyond a vestibule, is often broken, with no slam lock; that the lock this door has is unstable, loose, and can easily be picked; that the door is not often locked when she enters the Building; that the door has been an issue for several years; that once she heard a man's voice in the common area; that she opened her door; that she saw the person who repairs the intercom; that she asked how he got into the Building; that he said that the door was wide open; that she said she had keys to the subject premises; and that she let him in to fix the intercom.

As with the vermin, the violation in evidence constitutes prima facie proof of the condition. MDL §328(3). As with the violations for vermin, the subpoenaed HPD records show service of the notice of the violation, from April 5, 2019, upon Petitioner. Petitioner sent HPD a certification dated May 8, 2019 that it corrected violations other than the intercom, but which

were listed on the same page as the violation for the intercom, compelling the conclusion that Petitioner received notice of the violation.

A landlord's failure to take reasonable action to provide security to tenants breaches the warranty of habitability. 800 Victory Owners Inc., v. Bouchard, 1990 N.Y. Misc. LEXIS 785 (App. Term 2nd Dept. 1990), Auburn Leasing Corp. v. Burgos, 160 Misc.2d 374, 377 (Civ. Ct. Queens Co. 1994), 610 W. 142nd St. Owners Corp. v. Braxton, 137 Misc.2d 567, 571 (Civ. Ct. N.Y. Co. 1987), *modified on other grounds*, 140 Misc.2d 826, 827 (App. Term 1st Dept. 1988), Brownstein v. Edison, 103 Misc.2d 316, 318 (S. Ct. Kings Co. 1980).

Petitioner did not rebut the evidence regarding the intercom nor, as explained above, prove any affirmative defense of denial of access, to the extent that access may have been needed to correct this violation. The Court finds that this violation diminished the habitability of the subject premises by three percent. As the record is not clear as to when in December of 2020 the violation was corrected, the Court shall award an abatement for June through December of 2019 and August through November of 2020. Respondent's aggregate rent liability for these months was $11,567.19. Three percent of $11,567.19 is $347.02.

Toilet

Respondent testified that her toilet was not flushing properly; that the toilet overflowed all the time; that she had to use a bucket to flush toilet; that workers would come with a plunger and a snake, but that did not fix the problem; that the problem lasted for seven months before this case started, although she did not remember the year that the problem started; that she hired a plumber to fix toilet herself after four or five months; that the super would come first; that the super then would send a porter; that the super changed the pump one time, which fixed the problem for a good four to five months; and that employees who came never said they were

plumbers or presented licenses despite her request to Petitioner for a licensed plumber. The work order that Respondent signed on December 6, 2019 said, *inter alia*, that the toilet is still not working. Respondent testified that the super came to the subject premises on December 30, 2019 to snake the toilet; that that work only fixed the problem for two days; that her plumber advised her that the toilet should be replaced; that on January 3, the toilet backed up and started flooding again; that the super was at the subject premises that day to deal with that; that after that she decided that she would spend her money and get a plumber herself; and that she does not remember if she notified Petitioner that she would hire her own plumber; that the toilet stopped working again; that HPD then fixed her toilet; and that it works now. Subpoenaed HPD records corroborate that HPD was doing work on Respondent's toilet.

Respondent introduced into evidence an email she wrote Petitioner on January 3, 2020, requesting a plumber. Respondent introduced into evidence a video recording taken on January 3, 2020 of a toilet that looks like it was stopped up that she sent to the plumber that she retained. Respondent testified that she paid plumber $450.

The Building Supervisor testified on cross-examination that he responded to complaints about the toilet in the subject premises; that when Respondent let him in, he did the work; and that the toilet did not need a plumber, just to be plunged.

While the preponderance of the evidence shows that this condition existed, the dates are unclear. Respondent testified that the condition "lasted" for seven months before the commencement of this proceeding, but Respondent did not remember when the condition started, which leaves upon the possibility that the seven months pre-dated June of 2019, the earliest date that the record has a rent amount. The time frame is further muddied by Respondent's testimony that some fix or another remedied the problem for four or five months. Respondent's testimony

makes it unclear when this four- or five-month time period started and finished and how that period interacts with June of 2019. At the very least, the preponderance of the evidence showed that this was a problem in December of 2019.

As noted above, Petitioner did not prove that Respondent denied Petitioner access to the subject premises. The Building Supervisor indeed testified that he had access to the subject premises to address this problem which, in combination with the work order, also shows that Petitioner had notice.

The problem with the toilet diminished the habitability of the subject premises by thirty percent. Respondent's rent liability for December of 2019 was $1,048.29. Thirty percent of $1,048.29 is $314.49.

Oven

Respondent testified that she did not have an oven that worked for several months and that rats chewed out the middle of the stove. Respondent testified on cross-examination that the stove was partially repaired; that it is not fully functioning; that there is no open violation for that item; that Petitioner made that repair; that HPD approved it; and that she was probably present when HPD inspected. The record does not contain adequate proof of the dates that this condition started and finished. Respondent therefore did not prove all the elements of a rent abatement for this condition by a preponderance of the evidence.

Windows

Respondent introduced into evidence a "B" violation for window balances throughout, placed on October 25, 2019. Respondent testified that Petitioner repaired window balances in April. Respondent testified on cross-examination that her windows slammed shut and would not stay open in early 2020, before the pandemic.

Subpoenaed HPD records show service of a notice of violation of this condition and a certification that Petitioner sent HPD stating that Petitioner corrected the condition on January 3, 2020, which shows that Petitioner had notice and access. While the certification differs from Respondent's testimony about the date that the violation was corrected, as Respondent cannot get a rent abatement from January of 2020 through April of 2020 by virtue of her prevailing on her MDL §302-a counterclaim, this discrepancy is immaterial.

This violation diminished the habitability of the subject premises by six percent. Respondent's aggregate rent liability for November and December of 2019 was $2,096.58. Six percent of $2,096.48 is $125.79.

Other violations, total abatement

Respondent introduced into evidence an "A" violation for a non-working vent in the bathroom placed on October 25, 2019. Respondent testified on cross-examination that the vent in the bathroom is still not remedied; that it has been that way for fifteen years; that Petitioner told her that she did not need a ventilation system; that they would not turn it back on; and that the bathroom does not have a window. As HPD deemed this violation to be non-hazardous and the record does not contain evidence sufficient for the Court to determine the effect of this violation on the habitability of the subject premises, the Court does not award an abatement for this condition. Similarly, a "B" violation dated December 4, 2020 in evidence for defective faucets is not supported by evidence in the record sufficient upon which to base a determine about its effect on habitability The same proposition applies to a violation for painting, which Respondent testified that Petitioner corrected the same day that Petitioner caulked in the windows at the end of 2019 or the beginning of 2020.

The total amount of rent abatement the Court awards is $3,208.85. Petitioner points out that Respondent is in rent arrears. However, the Court has already dismissed the petition as per its prior order. The Court shall not offset an affirmative cause of action for breach of the warranty of habitability against rent arrears. Amodeo v. HVHC, 31 Misc.3d 148(A)(App. Term 1st Dept. 2011). Be that as it may, any judgment the Court awards in favor of Respondent would be without prejudice to any rent arrears that may remain, which Petitioner may seek in an appropriate proceeding.

Harassment

"Harassment" means, *inter alia*, any act or omission by owners intended to cause tenants to vacate their apartments or to surrender or waive any rights in relation to their tenancy and includes the use of force or threats, repeated failures to correct "B" or "C" violations, or other repeated acts or omissions of such significance as to substantially interfere with or disturb the comfort, repose, peace or quiet of a tenant. N.Y.C. Admin. Code §§27-2004(a)(48)(a), 27-2004(a)(48)(b-2), 27-2004(a)(48)(g). Proof of any of these three transgressions gives rise to a "rebuttable presumption" that an owner intended to cause a tenant to vacate or surrender rights. N.Y.C. Admin. Code §27-2004(a)(48).

Petitioner sent Respondent a letter dated December 5, 2019 claiming that Respondent denied Petitioner access on December 6, 2019. Even assuming *arguendo* that the date on the letter is a typographical error, the letter is without merit, as Petitioner's own work order shows that Petitioner had access to the subject premises. Similarly, Petitioner sent Respondent another letter dated November 27, 2020 claiming that Respondent denied Petitioner access on November 24, 2020 and, significantly, that Petitioner was unaware of repairs done at this time in the subject

premises. Yet, as noted above, Petitioner certified to HPD in an affidavit also dated November 27, 2020 that it had corrected a violation in the subject premises on November 25, 2020.

If Petitioner took the position that it corrected a violation in the subject premises, then the letter to Respondent of November 27, 2020 had no purpose other than to contrive a paper trail to support a potential holdover proceeding against Respondent for denial of access. In fact, Petitioner's letters to Respondent about access habitually threaten her with such action. The record, however, shows that Respondent gave Petitioner access to the subject premises a number of times. Petitioner's own work order showed that Respondent gave access on December 6, 2020. Petitioner's own certifications stated that Petitioner corrected violations in the subject premises on January 3, 2020 and November 25, 2020. Petitioner's own letter to Respondent stated that Petitioner inspected the subject premises on March 13, 2020. Petitioner's own witness, the plumber, testified that he inspected the shower body in the subject premises on December 18, 2020. Petitioner did not rebut Respondent's testimony that she provided Petitioner with access on December 5, 2019, December 30, 2019, January 2, 2020 (to the super after she did not consent to let a porter into the subject premises). The Building Supervisor actually testified that he had been to the subject premises, including in 2020. On this count, Respondent has provided Petitioner with access to the subject premises eight times over the course of thirteen months.

A landlord has a right to access to an apartment to make repairs, but the demand for access must be reasonable. N.Y.C. Admin Code §27-2008. The use of the word "reasonable" in the statute entails the application of an objective standard. MHM Sponsors Co. v. Hirsch, 15 Misc.3d 641, 644 (Civ. Ct. N.Y. Co. 2007). On an objective standard, asking any working person to take eight days a year off of work is asking a lot. Applying this standard to

Respondent's situation, Respondent has demonstrated a particularly negative effect from losing so many leave days from her job, a loss of a work benefit only exacerbated by Petitioner's process of eating up an entire eight-hour access date with an inspection without taking advantage of the access to repair, as Respondent testified and as the Assistant Property Manager confirmed. For Petitioner to impose that cost on Respondent and then layer on top of that letters routinely threatening eviction on the ground of denial of access is not only perverse but also substantially interferes with Respondent's peace and comfort, the definition of harassment according to N.Y.C. Admin. Code §27-2004(a)(48)(g).

Respondent also testified to an incident on November 14, 2019 where a porter raised his voice at her after having strewn her garbage outside of her door, testimony that Respondent's neighbor's testimony corroborated. A tenant has a cause of action for harassment against an "owner." An "owner" means a "lessee, agent, or any other person, firm or corporation, directly or indirectly in control of a dwelling...." N.Y.C. Admin. Code §27-2004(a)(45). While Petitioner is an "owner" for the purposes of the statute, the record does not show that the porter has the requisite level of control of a dwelling to be an owner. Petitioner is therefore liable for harassment only if the porter engaged in his conduct on behalf of Petitioner or if Petitioner's failure to take some measure against the porter amounts to an "omission" as provided by the statute.

Respondent testified that another porter is polite and that other employees of Petitioner's came to the subject premises without incidents, indicating that Petitioner was not engaged in any type of campaign to force Respondent to vacate or surrender rights. Rather, the record shows that porter himself initiated his confrontation with Respondent. Respondent testified that Petitioner's only response to her contemporaneous complaint was to advise Respondent to call

police. Respondent's amended answer and affidavit in support of her motion to amend her answer, both dated December 10, 2019 and served on Petitioner's counsel around that time, speak to the incident with the porter. The record shows no indication that Petitioner took any action with regard to Respondent's allegations.

Petitioner points out that Respondent did not name the porter. While Petitioner raises a fair point about the limitations of its options given that Respondent did not name the porter, it could not have been impossible to discern the identity of this porter. After all, the porter was the person who Respondent would not let into the subject premises on January 2, 2020, which she told Petitioner about contemporaneously, an incident memorialized in the Assistant Property Manager's letter to Respondent of that date. It is hard to imagine any other employer failing to take any action at all, even the most cursory investigation, into a similar allegation about an employee. Had Petitioner done something, Respondent would have a harder time proving an incidence of harassment. But given that N.Y.C. Admin. Code §27-2048(a)(48) defines "harassment" in part as an "omission," the absence of any action of Petitioner whatsoever in the record to Respondent's allegation, whether by her phone call on November 14, 2019 or at the very least by the service of her answer with the allegation less than a month later reveals an indifference to her peace, repose and comfort sufficient to be actionable pursuant to the statute.

Respondent also argues that Petitioner has repeatedly failed to correct "B" and "C" violations as well, although Petitioner's eventual correction of the violations complicates Respondent's argument as such. Be that as it may, as Respondent has shown that Petitioner's threatening letters and inaction in the face of an accusation of intimidation by a porter satisfies the elements of N.Y.C. Admin. Code §27-2005(d), the Court does not reach this issue.

Tenants who prove harassment may obtain placement of housing maintenance code violations, an injunction restraining a landlord from engaging in such conduct, civil penalties payable to the New York City Commissioner of Finance, N.Y.C. Admin. Code §27-2115(m)(2), compensatory damages, punitive damages, and attorneys' fees. N.Y.C. Admin. Code §27-2115(o). The petition seeks all of this relief. Having found that Petitioner has harassed Respondent as defined by the statute, the Court will direct HPD to place a violation and enjoin Petitioner from future harassment.

The civil penalties awarded shall be payable to HPD and shall not be less than $2,000 nor more than $10,000. N.Y.C. Admin. Code §27-2115(m)(2). Respondent's inability to tell Petitioner the porter's name, Petitioner's omission rather than an act in that regard, and the fact that only two of the letters Petitioner sent Respondent were demonstrably untrue are mitigating factors. Accordingly, the Court awards penalties of $2,500.00.

Compensatory damages cannot be contingent or speculative, but ascertainable to a degree of reasonable certainty. E.J. Brooks Co. v. Cambridge Sec. Seals, 31 N.Y.3d 441, 448-49 (2018). Aside from a rent abatement, which the Court awards separately as noted above pursuant to Respondent's counterclaim, Petitioner did not prove compensatory damages as such. In the absence of such proof, the Court can award Petitioner compensatory damages of $1,000.00. N.Y.C. Admin. Code §27-2115(o). Petitioner has not proven that Respondents' omission regarding the porter or the letters that the Assistant Property Manager sent Respondent rose to a level of intent or malice required to support the imposition of punitive damages. 2301 7th Ave. HDFC v. Hudgen-Grace, 29 Misc.3d 130(A)(App. Term 1st Dept. 2010). Together with the rent abatement awarded above, the total monetary damages the Court awards Respondent is $4,208.83.

Respondent also seeks an award of attorneys' fees, which N.Y.C. Admin. Code §27-2115(o) entitles a successful harassment claimant to. Respondent's post-trial memorandum also cites RPL §234, which would entitle Respondent to an award of attorneys' fees for her prevailing on the dismissal of the nonpayment petition if the parties had a lease between them with an attorneys' fees clause. However, there is no lease in the record on this trial. Hours for which the Court may award attorneys' fees for Respondent's harassment cause of action have the potential to be distinct from and to overlap with attorneys' fees for Respondent's prevailing on dismissal of the nonpayment petition in a way in which adjudicating one without the other does not accord with judicial economy and finality of claims. The Court therefore holds Respondent's counterclaim for attorneys' fees in abeyance pending a motion for the same that would be determinative of all of Respondents' attorneys' fees counterclaims.

Accordingly, it is

ORDERED that the Court denies Respondent's motion to hold Petitioner in civil contempt of Court; and it is further

ORDERED that the Court makes a finding that Petitioner has engaged in harassment of Respondent in violation of N.Y.C. Admin. Code §27-2005(d), and it is further

ORDERED that HPD place a "C" violation for harassment on the subject premises, upon service of a copy of this order together with notice of entry by any party on HPD, and it is further

ORDERED that the Court directs Petitioner to cease all harassment of Respondent, and it is further

ORDERED that the Court awards Respondent a judgment on her counterclaims of breach of the warranty of habitability and harassment in the amount of $4,208.83 as against Petitioner, and it is further

ORDERED that the Court awards HPD civil penalties against Petitioner in the amount of $2,500.00, to be enforced as against the Building, at Block 1954, Lot 2 of the borough of Brooklyn, and it is further

ORDERED that the Court dismisses Respondent's cause of action for punitive damages, and it is further

ORDERED that the Court holds Respondent's counterclaim for attorneys' fees in abeyance pending a separate comprehensive motion for attorneys' fees.

This constitutes the decision and order of this Court.

Dated: New York, New York
March 22, 2021

_____

HON. JACK STOLLER
J.H.C.