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Morales v. 1160 Cromwell Crown LLC

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2021 NY Slip Op 50748(U)
Decided on August 3, 2021
Civil Court Of The City Of New York, Bronx County
Ibrahim, J.
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Decided on August 3, 2021

Civil Court of the City of New York, Bronx County

Milagros Morales, Petitioner,

against

1160 Cromwell Crown LLC, ROGER TATE, RICHARD TIMBERGER & STEVEN FINKELSTEIN, Respondents, and New York City Department of Housing Preservation and Development (DHPD), Co-Respondents.

309734/2020

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Shorab Ibrahim, J.

The petition in this "HP proceeding" alleges that petitioner is the tenant and/or occupant of the subject premises (1160 Cromwell Avenue, Apt. 6J, Bronx, NY 10452), that the named respondents are owners under the Housing Maintenance Code ("HMC") and that there are conditions in need of repair in the subject apartment.

At issue is whether the alleged sloping floors in petitioner's apartment warrant the issuance of an order to correct.

To support the issuance of the order to correct petitioner submits an order from the Division of Housing and Community Renewal Order ("DHCR"), dated May 13, 2021, denying respondents-landlords' Petition for Administrative Review ("PAR") of a prior rent-reduction order issued by the agency. The PAR order notes that an inspection was conducted on April 22, 2021. That inspection "revealed that the floors in the living room, hallway, bedroom 1, and bedroom 2 are slightly uneven."[FN1] However, it is uncontested that the Department of Housing Preservation and Development ("DHPD"), the agency tasked with enforcing the HMC, *can* place violations for a sloping floor, but did not do so after inspecting the apartment in December 2019.

Respondents urge this court to dismiss the proceeding because DHPD did not issue a violation for the condition.

But, dismissal is not appropriate under the facts presented here. Although the existence of conditions which may rise to the level of a violation of the HMC may be proved by inspection reports, such conditions may also be established through DHPD or other governmental computerized records, photographs, or witness testimony. (*see* Scherer and Fisher, *Residential Landlord-Tenant Law in New York § 19:65* [2019 Update]; *Mite v Pipedreams Realty*, 190 Misc 2d 543, 740 NYS2d 564 [Civ Ct, Bronx County 2002]; *see also* NYC Admin Code § 27-2115(h)(1)). Ordinarily, DHPD's failure to place a violation is material because the refusal of DHPD to issue a violation creates the presumption that the condition does not exist. (*Schlueter v East 45th Development LLC*, 9 Misc 3d 1105[A] at *8,

2005 NY Slip Op 51405[U] [Civ Ct, New York County 2005]). Here, however, such a presumption is inappropriate since DHCR, another governmental agency, not only found that the condition exists some sixteen (16) months *later*, but also found that the condition supports a rent-reduction.

The court begins with the premise that it may order correction of certain conditions found by DHCR. Although the court has not found any published decisions directly on point, **[FN2]** established precedent leads to the same conclusion.

To begin, § 110 of the New York City Civil Court Act ("CCA") addresses the Housing Part of the Civil Court. Section 110 (c) provides that "regardless of the relief originally sought by a party the court may recommend or employ any remedy, program, procedure or sanction authorized by law for the enforcement of housing standards, if it believes they will be more effective to accomplish compliance or to protect and promote the public interest... § 110(e) provides that Housing Court judges are '... empowered to hear, determine and grant any relief within the powers of the housing part in any action or proceeding except those to be tried by jury.'" (*see Truglio v VNO 11 E. 68th St. LLC*, 35 Misc 3d 1227(A), *30-31, 953 NYS2d 554 [Civ Ct, New York County 2012]).

The statutory framework which created the Housing Part of the Civil Court explicitly gives this court jurisdiction to grant injunctive relief to enforce "state and local laws for the establishment and maintenance of *housing standards*, including, but not limited to, the multiple dwelling law and the housing maintenance code, building code and health code." (CCA § 110[a] [4] [emphasis added]).

The term "housing standards" as used in the CCA should be given as broad a meaning as possible. (*see Various Tenants of 515 East 12th Street v 515 East 12th Street, Inc.*, 128 Misc 2d 235, 236, 489 NYS2d 830 [Civ Ct, New York County 1985]).

Indeed, it is well-settled that the Housing Part has the power and jurisdiction to enforce correction of conditions found by agencies other than DHPD. (*see Various Tenants of 515 East 12th Street v 515 East 12th Street, Inc.*, 128 Misc 2d at 236); *see also Robertson v Jones*, 66 Misc 3d 1219(A), *3, 120 NYS3d 724 [Civ Ct, New York County 2020]; *Schanzer v Vendome*, 7 Misc 3d 1018(A), *5-6, 801 NYS2d 242 [Civ Ct, New York County 2005] ["The Civil Court Act further gives this court the jurisdiction to issue 'an injunction, restraining orders or other orders' to enforce Building Code violations the court must exercise its

authority so that it can fulfill [*2]its mission: to protect and preserve housing stock."] [internal citations omitted]).

This court sees little difference in enforcing, for example, violations issued by the Department of Buildings versus conditions that result in a rent reduction order issued by DHCR. The question is not which agency found the condition, but whether "a tenant's health and safety are implicated" and whether enforcement would "protect and preserve housing stock." (*see Schanzer v Vendome*, 7 Misc 3d 1018(A)).

DHCR rent-reduction orders are meant to and have been found to serve these very same public policy goals. (*see ANF Co. v Division of Housing & Community Renewal*, 176 AD2d 518, 520, 574 NYS2d 709 [1st Dept 1991] [" the consequence of an owner's failure to maintain services to a rent stabilized apartment, i.e., suspension of the most recent rent guideline increase, which is also set forth in 9 NYCRR 2523.4(a), is directed toward implementing *an important public policy and achieving a significant goal of the Rent Stabilization Law—the preservation and maintenance of New York City's housing stock"*] [emphasis added]).

In issuing the rent reduction, DHCR found the condition in dispute is more than *de-minimis*. In other words, as "slightly" as the floors may slope, the agency found it rises "to the level of a failure to maintain a required service..." As a result, the condition has more than a minimal impact on the tenant and affects the use and enjoyment of the premises. (9 NYCRR 2523.4(e)).

Critically, respondents may not attack DHCR's finding in this proceeding as DHCR orders have "the effect of establishing, as a matter of collateral estoppel, the conditions that it found to exist." (*Lorcorp Inc. v Burke*, 185 Misc 2d 720, 722 [App Term, 2nd Dept 2000]). As such, the court is unmoved by the fact that DHPD failed to place a violation for the condition some sixteen (16) months earlier.**[FN3]**

Respondents further argue that petitioner, in obtaining the rent-reduction, received the relief she sought and may not seek additional relief through this proceeding. This argument has no merit. It has long been recognized that rent-reduction orders do not preclude a tenant's other remedies. (*see K C Rush Realty Associates LLC v Weston*, 1 Misc 3d 130(A), 2003 NY SLIP OP 51591(U) [App Term, 2nd & 11th Jud Dists 2003]). Other courts have ordered

correction of conditions found by DHCR. (*see Wallace 18 LLC v Tucker*, 66 Misc 3d 1209(A), 2020 NY Slip Op 50031(U) [Civ Ct, Bronx County 2020]).

That this court should "enforce" the DHCR order is clear under the facts presented here. Respondents, for their part, seem content with the rent-reduction. To the extent, however, that the rent-reduction was supposed to compel correction of the underlying condition, it has failed to do so.[FN4] The rent reduction, on its own, does not preserve housing, vindicate tenants' entitlement to safe and secure accommodations, or promptly ameliorate hazardous and unhealthy conditions. (*see Schanzer v Vendome*, 7 Misc 3d 1018(A at *4). The court cannot encourage landlords to defer maintenance in exchange for a rent reduction, thereby considering the lost rent a cost of [*3]doing business. (*Id*. at *5). A rent-reduction is often slight, while the impact of the underlying conditions on a tenant's health and safety is often significant.

The court next turns to respondents' answer and whether it raises any valid defenses to an order to correct.

The answer, in this court's view, does not raise any defense to an Order to Correct *as a matter of law*. (*see D'Agostino v Forty-Three E. Equities Corp.*, 12 Misc 3d 486, 489-490 [Civ Ct, New York County 2006] *aff'd on other grounds*, 16 Misc 3d 59 [App Term, 1st Dept 2007]; *Vargas v 112 Suffolk St. Apt. Corp.*, 66 Misc 3d 1214[A] at *3 [Civ Ct, New York County 2020] ["[t]he few defenses to an order to correct include lack of standing or jurisdiction, completed repairs, that conditions are not code violations, that the respondent is no longer the owner, and economic infeasibility"] [internal citations omitted]; *Allen v 219 24th St. LLC*, 67 Misc 3d 1212(A), *17, 126 NYS3d 854 [Civ Ct, New York County 2020]; *Morales v Balsam*, 69 Misc 3d 1204(A), *1-2, 2020 NY Slip Op 51176(U) [Civ Ct, Bronx County 2020]). Respondents' February 19, 2021 answer does not properly raise any of these recognized defenses.[FN5]

The personal jurisdiction defense [second affirmative defense] is entirely conclusory and is not supported by an affidavit from someone with personal knowledge. Consequently, the presumption of proper service created by petitioner's affidavit of service is not overcome. (*see Kihl v Pfeffer*, 94 NY2d 118, 122, 700 NYS2d 87 [1999]; *In re de Sanchez*, 57 AD3d 452, 454, 870 NYS2d 24 [1st Dept 2008]). Citing to HMC § 27-2115(b), respondents' third affirmative defense alleges that no affidavits of proper mailing of each notice of violation

exist and that the notices of violations were not properly served on respondents. Thus, respondents argue, the time frame for correction of the conditions described in the notices of violations never began. Here, respondents conflate a defense to the imposition of civil penalties with a defense to an order to correct. While improper service of a notice of violation might constitute a defense to the former, it is not a defense to the latter.

In any event, service of a notice of violation on an owner is of no import in this tenant-initiated action. While the HMC does require DHPD to serve a notice of violation upon an owner, and a failure to do so can constitute a defense to a DHPD-initiated HP proceeding, (§27-2115(b); D'Agostino v Forty-Three E. Equities Corp., 12 Misc 3d 486, 489-90 (Civ Ct, New York County 2006), *aff'd on other grounds*, 16 Misc 3d 59 (App Term, 1st Dept 2007), a tenant "may ... apply to the [H]ousing [P]art for an order" if HPD "fail[s] to issue a notice of violation ...." (HMC §27-2115(h)(1)). As such, in a tenant-initiated HP proceeding, DHPD's putative failure to serve a notice of violation can constitute *a basis for a tenant's cause of action*, *not a defense* to the tenant-initiated proceeding. (*Vargas v 112 Suffolk St. Apt. Corp.*, 66 Misc 3d 1214[A] at *3). In any event, the third affirmative defense suffers from the same defects as the second affirmative defense.

The court has considered respondents' other defenses and finds them similarly without merit.

The court notes that, pursuant to CPLR 409(b), it is required to "make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised." (*Brusco v Braun*, 199 AD2d 27, 31-32, 605 NYS2d 13 [1st Dept 1993]; *FR Holdings, FLP v Homapour*, 154 AD3d 936, 938, 63 NYS3d 89 [2nd Dept 2017]; *1646 Union [*4]LLC v Simpson*, 62 Misc 3d 142[A], 2019 NY Slip Op 50089[U] [App Term, 2nd Dept 2019]).

Here, there is no issue of fact as to the parties, the claims, or the defenses. As such, an Order to Correct is appropriate. However, the court cannot issue an Order to Correct without first classifying the violation. The DHCR Order is silent on the issue. Classifying the violation, which is done with all DHPD issued violations, is necessary in establishing the severity of the condition, which in turn establishes a time frame for correction. (*see* NYC Admin Code § 27-2115(a) and (c)(1); *Notre Dame Leasing LLC v Rosario*, 2 NY3d 459, 463 n.1 [2004]).

As such, this proceeding is adjourned to September 22, 2021 at 10 a.m for a hearing in Part H, Room 390, to determine whether the sloping floors found by DHCR constitute a non-hazardous, hazardous, or immediately hazardous violation. Following that determination, the court shall issue an order to correct pursuant to CPLR § 409(b) unless the condition has been corrected and proof of correction is presented by competent evidence.

This constitutes the Order of the court. Copies will be emailed to respective counsel.

Dated: August 3, 2021

SO ORDERED,

Bronx, NY

/S/

SHORAB IBRAHIM, JHC

Footnotes

Footnote 1: Respondents do not dispute the existence of the DHCR Order

Footnote 2: In *Wallace 18 LLC* v Tucker, 66 Misc 3d 1209(A), 2020 NY Slip Op 50031(U) [Civ Ct, Bronx County 2020], the court ordered correction of conditions found by DHCR in the context of a non-payment proceeding.

Footnote 3: An owner might, however, attempt to prove that a condition cited by DHCR does not violate the HMC. That is not the case here as both parties acknowledge that sloping floors *do* violate the HMC.

Footnote 4: The court notes that the April 2021 DHCR inspection was conducted as a result of the owner's PAR. In the PAR application, the owner represented it had "inspected and repaired any defects to the floor in the subject apartment."

Footnote 5: The answer is not verified. (see NYSCEF Doc. 8).

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