2021-09-13

Dep't. of Hous. Pres. and Dev. v. Vabre

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

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DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT,

Petitioner,

DECISION AND ORDER

-against-

DOMINQUE VABRE and 9M4N HOLDINGS LLC,

Index # 2084/2019

Respondent.

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AARON MILTON JR.,

Petitioner,

DECISION AND ORDER

-against-

9M4N HOLDINGS LLC, et al.,

Index # 2971/2019

Respondent.

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Present: Hon. Jack Stoller
Judge, Housing Court

Aaron Milton Jr. ("Petitioner #1"), Alexis Mena ("Petitioner #2"), Celeste Waters ("Petitioner #3"), Daiju Edwards ("Petitioner #4"), Laura Saldana ("Petitioner #5"), Ronny Nunez ("Petitioner #6"), and Terry Kenard Barnes ("Petitioner #7"), the petitioners in one of these proceedings (collectively, "Petitioners"), commenced their Housing Part proceeding ("HP proceeding") against 9M4N Holdings LLC, Refolio Holdings LLC, and Dominique Vabre ("Respondents")[1] pursuant to New York City Civil Court Act §110 seeking different forms of relief against Respondents with regard to 94 Monroe Street, Brooklyn, New York ("the subject

[1] Although different respondents are named in the two proceeding, in this decision, the Court refers to all of them collectively as "Respondents."

premises"), although Petitioners indicated at trial that they were not pursuing their harassment causes of action. The Department of Housing Preservation and Development of the City of New York ("HPD") commenced the other HP proceeding against Respondents also seeking an order to correct. Respondents interposed an answer. The Court held a joint trial of these matters on May 20, 2021 and May 21, 2021 and adjourned the matter for post-trial submissions to July 30, 2021.[2]

The trial

HPD introduced into evidence a number of violations of the New York City Housing Maintenance Code at the subject premises ("the Violations"), including several "C" violations dated February 25, 2019 for fire damage;[3] an order that HPD placed on the subject premises directing that the occupants vacate by March 12, 2019 because of fire damage and an absence of gas, heat, electricity, and a water supply ("the Vacate Order");[4] and proof of service of notices of violation in compliance with N.Y.C. Admin. Code §27-2115(o). Petitioners introduced into evidence an order to correct that the Court entered in HPD's proceeding against Respondents dated December 11, 2020 ("the Extant Order To Correct"). The Extant Order To Correct found

[2] The parties in this matter were to make their post-trial submissions on July 30, 2021. After the parties made their submissions, Respondents purported to submit a "reply," which was not contemplated in any submission schedule. Moreover, as the party who opens the trial gets to close the trial, CPLR §4016(a), the other party is not entitled to a "reply" submission. Accordingly, the Court did not consider the "reply" that Respondents purported to submit.

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

[4] HPD has the power to order any dwelling which is unfit for human habitation to be vacated. N.Y.C. Admin. Code §27-2139, NY City Charter §1802.

that a fire occurred at the subject premises on February 20, 2019 and directed Respondents to correct the Violations within seven days for "C" violations, thirty days for "B" violations, and ninety days for "A" violations. Petitioners introduced into evidence violations placed on the subject premises by the New York City Department of Buildings ("DOB") noting an inspection on February 20, 2019 warranting a full vacate order.[5]

Petitioner #7 testified that he moved to a particular room in the subject premises in 2018; that he paid rent at a rate of about $800 a month; that he interacted with someone named "Mr. Aronov" ("the Landlord"); that a group would call him to get things fixed like plumbing, electricity, and a door lock; that the Landlord would enter the subject premises without notice with an employee who never identified himself and who was recording with a camcorder; that the Landlord one time put numbers on doors and presented something that looked like a makeshift eviction notice that was not official; that Petitioner #7 communicated with a landlord and a management company; that the Landlord said that he would start working with them to get repairs done in September or October; that the Landlord would constantly switch off breakers; that a basement flooded; that the Landlord used a sump pump; that stairs were creepy and loose; that toilets would clog; that showers on the first and second floors were not working; that a shower on a third floor was sitting for months at a time; that Petitioners were down to one shower; that they reached out to the Landlord in October to see where the Landlord was with repairs; that they got no response for months; that a fire occurred in February of 2019; that on the day of the fire when he returned to the subject premises Petitioners, who he characterized as his roommates, were at a YMCA kitty-corner to the subject premises; that the Red Cross was there, helping people salvage things; that a cleaning crew came from the Landlord's management

[5] DOB also has the authority to issue a vacate order. N.Y.C. Admin. Code §26-127(b).

company, cleaning up their things as the Red Cross was taking them in for temporary shelter; that they called the Landlord to ask that he stop trashing their things and give them more time to get their things, and that they have not been back to the subject premises since then.

Petitioner #7 testified on cross-examination that he moved to the subject premises in August of 2018; that he signed a lease agreement with current tenants; that the Landlord was not a party to that lease; that he rented his room from a tenants' association; that he interviewed with Petitioner #1, Petitioner #6, and another tenant named Casey Appleton ("the Occupant"), all of whom had signed the lease; that he did not have a copy of the lease; that his lease was a month-to-month lease; that he paid $800 rent to Petitioner #6 in cash; that he got receipts, but they were destroyed in the fire; that Petitioner #6's room, a bathroom, office supplies, a closet with an unusable kitchen space, and a living room were on the second floor of the subject premises; that the first week of November of 2018 was his first interaction with the Landlord; that he saw the Landlord again in December of 2018; that he saw the Landlord come into every space in November of 2018; that they spoke about the maintenance of the subject premises and rent payments; that he told the Landlord he was paying rent to Petitioner #6 and the Occupant who put it into a "mutual fund;" that he did not know where the funds were held; that the Landlord never asked for rent; that their idea was that they would put the money into a fund for repairs themselves; that they did not get permission from a landlord to repair facilities themselves; that the Landlord came a few weeks before the fire and put numbers and "unofficial eviction notices" on doors; that he did not have the unofficial eviction notice; that anything in his room was lost to him, thrown in the trash by a cleaning crew on the same day as the fire; that the day after the fire he was locked out of the subject premises; that utilities were included in his rent; that he did not have an account for utilities in his own name; that he asked the Landlord for permission to

retrieve his belongings multiple times; that his room was unfurnished when he rented it; that the door to his room was white; that they painted the walls a tangerine color; that Petitioner #1 is his partner; that did not remove papers from the subject premises on the day of the fire, but rather removed his cat's body, a bag of clothing that was drenched, textbooks, and artwork; that most of the stuff was burnt or smelled of soot and was water-damaged; and that the Fire Department ("FDNY") was rushing them off the property because they wanted to make sure that they would get out safely.

Petitioner #7 testified on redirect examination that the parties to that lease were him and the current tenants; that it was his understanding that the Landlord would review the lease; that he paid rent to Petitioner #6 of the Occupant; and that his expectation was that they would transfer the money to the Landlord.

Petitioner #2 testified that he moved into a particular room in the subject premises in September of 2018; that Petitioner #6 gave him the Landlord's phone number; that he spoke to the Landlord before he moved in; that Petitioner #6 put him on a text thread with the Landlord; that they were texting each other; that he spoke to the Landlord mostly to complain about repairs that needed to be done; that he paid rent in an amount of $650; that he once saw the Landlord enter the subject premises with an employee who walked in holding a phone recording everything while they entered each room; that they said it was a standard walk-through; that Petitioner #6 and Petitioner #1 were there at the time; that the Landlord said that a management company would handle complaints about conditions and that repairs would be done as long as he made his payments; that he paid but repairs were not done; that, on the day of the fire, DOB was inspecting the subject premises; that he used to be a mortgage officer and had experience working with DOB inspectors; that he was there on the day of the fire and saw that it started in

another room when a DOB inspector happened to be there; that he had tried to put out a fire in his room with a fire extinguisher, but it was not enough; that the DOB inspector called 911; that everyone in the subject premises at the time got out; and that FDNY gave them permission to retrieve belongings before they moved to a shelter.

Petitioner #2 testified on cross-examination that when he moved in, he did not sign a lease; that the Landlord said that he would be there month-to-month; that Petitioner #6 showed him the room initially; that the Landlord was the one who told him to work with Petitioner #6 as a point person; that the Landlord told him that his rent would be $650; that he got receipts for rent paid but lost all his belongings in the fire; that he does not remember who signed the receipts; that he did not know about a "mutual fund" or any joint account being held by an occupant of the subject premises; that he knew the Occupant, who was a tenant; that he called the Occupant a "lone wolf"; that he thought that the Occupant was there before him up until the fire; that he did not sign a lease with the Occupant; that he did not remember if there was an extension cord from his room; that he did not remember if he spoke to someone from the FDNY; that he was never presented with a lease; and that used to have a phone number for the Landlord, but he has not had it since he got a new phone. Petitioner #2 testified on redirect examination that the Landlord never said anything about nonpayment of rent.

Petitioner #5 testified that she lived in a particular room in the subject premises starting in June or July of 2018; that she did not have much of a landlord/tenant relationship; that she went through Petitioner #6, who told her about the Landlord; that she understood the Landlord to be "Isaac"; that the Landlord was neglectful; that they would message the Landlord; that the Landlord would not get back to them; that they set up a meeting which the Landlord came to and all of them were there; that the Landlord phoned in; that the Landlord was unhappy with them

living there and they wanted to address that; and that when she called the Landlord, he told her that she did not belong there. Petitioner #5 testified on cross-examination that she had no written lease; that she discussed moving in with Petitioner #6 and Petitioner #4; that Petitioner #4 had been living in the subject premises; that she introduced Petitioner #5 to Petitioner #6; that she did not remember if she spoke to a landlord about moving into the subject premises after she met Petitioner #6; that Petitioner #6 told her that the rent would be $680; that she paid $680 plus something; that she paid a first month in cash or Venmo; that she paid rent every month from when she moved in until February of 2019, the month of the fire; that she thought that rent money was put into an account for the Landlord; that she first spoke to the Landlord at that meeting; that she did not remember the date of the meeting, although it might have been in 2018; that the meeting was "semi-close" to the fire; and that the Occupant lived in the subject premises although she did not know him well.

Petitioner #3 testified that she had lived in a particular room in the subject premises since August of 2018; that she had no relationship with the Landlord; that Petitioner #6 gave her the Landlord's name; that Petitioner #6 was a liaison for the Landlord; that they did repairs at their own expense; and that a plumber once came to the subject premises. Petitioner #3 testified on cross-examination that she did not sign a lease when she moved in; that someone else was moving out and offered her the room and she spoke with the tenants and then to Petitioner #6; that the person who moved out, who was named "Destiny Washington" ("the Prior Occupant") organized a group meeting in August of 2018; that she was told that the rent would be $600; that she paid a security deposit in that amount and the monthly to Petitioner #6; and that she got a receipt for a cash payment and otherwise paid by Venmo.

Petitioner #6 testified that he moved into a particular room in the subject premises in November of 2016; that he first talked to the Landlord after a court case in June, when they were designated as a single-room occupancy ("SRO"); that part of that case was in June 2017; that all of the occupants of the subject premises first met with the Landlord in person around October of 2017; that he understood the Landlord to be the landlord of the space, although he knew that the Landlord had has other similar aliases; that in 2017 they negotiated about what rent payments would be moving forward; that they presented an offer that did not satisfy the Landlord; that he next heard from the Landlord in December of 2018; that the Occupant, who had been a previous point person for the Landlord said that the Landlord was going to be visiting; that he had a direct conversation with the Landlord at that time; that the people there were in a court case for a long time; that the Occupant lived at the subject premises for the entire time that he lived there and was the primary contact for the Landlord's agents, but over the course of many years in Court case situation, there have been various point people, including someone named "Mia Ragazina" ("the Prior Point Person"); that Petitioner #2 provided a number for the Landlord and then he contacted the Landlord directly and they set up meetings from there; that that was supposed to take place in mid-to-late December of 2018 to January of 2019; that at that meeting, they were supposed to meet the Landlord in an attempt to normalize a relationship with him in part to set the rent and to get repairs done; that they had an ambiguous relationship with the Landlord, who disappeared and who had no contact with anyone at the subject premises; that they wanted to be recognized as residents of individual rooms; that the Landlord called in and said that he was going to be unable to attend the meeting; that he had a few texts with the Landlord around repairs, including heat issues; that a pipe downstairs once started leaking and flooding the basement; that that was repaired within a day; that there were more minor issues, such as water

leaking through a bathtub on the top floor into a light fixture; that there was an issue with a thermostat; that after contacting the Landlord, he sent an electrician who fixed it; that the Landlord did all of the repairs except for water damage in a light fixture on third floor directly below top floor; that the Landlord came in January and personally walked through the subject premises with an agent who videotaped the entire exchange; that the Landlord numbered all the rooms and asked who was in each room; that when he started living there, the occupants paid into an escrow account which had already been set up; that money for utilities and other repairs was in a personal account; that, after the people who were handling payments into the escrow account moved out, he became the point person to take on those payments; that he asked that people rent and utility payments into a Venmo account, where it remained; that they decided to disburse money to Petitioners after the fire, so the entirety of the rent did not remain in the Venmo account; and that the Landlord did not regulate who moved in or out of the subject premises.

Petitioner #6 testified on cross-examination that he met the Landlord personally in the kitchen of the subject premises in the context of prior litigation; that an agent of the Landlord named "Made Mark" was also there; that they negotiated rent amounts with the Landlord; that the Landlord did not make an explicit counteroffer; that Petitioner #6 was not a party to a lease; that he knew of a lease signed but was not sure who signed it; that after October of 2017, he paid $620 to $650 in rent into an escrow account held by the Prior Point Person; that he occupied a different room then what he later occupied; that the Prior Point Person was supposed to put money for rent into an escrow account and money for utilities into a personal account; that the Prior Point Person had internet access to that account; that he did not know if anyone else was on it; that he never made a payment directly to the Landlord; that rents were based on the last legal

lease; that utilities were an additional cost of $130 per person; that he was the only one who had access to the Venmo account for the entirety of the time period starting in June of 2018; that not every occupant paid every month; that he just rested on Venmo records; that the Prior Point Person moved out in May of 2018; that most of the prior residents left because of what was going on with them personally; that new people who moved in were told about the subject premises by word of mouth and were interviewed to be approved by the residents; that the Landlord had no involvement with that; that he collected a security deposit of $200 from people who moved in; that none of that money was given to the Landlord; that he met the Landlord in January of 2019 at the subject premises; that the Landlord asked for the identities of the occupants by room; that he told the Landlord the names of anyone who was there that day, but not the names for anyone who was not there on that day; that they did not consider releasing money to the Landlord; that when the Landlord did not respond they would repair themselves; that no one who was part of the prior litigation still lived in the subject premises at the time of the fire besides the Occupant; that he did not think that he was named in that litigation, as it started before he moved in; that he used to have a phone number for an agent of the Landlord named "Melissa," who he called multiple times and last communicated with her in 2017 or 2018; and that he gets monthly statements from Venmo accounts, which are easily accessible.

Petitioner #1 testified that he moved into a particular room in the subject premises in August of 2018 and lived there until the fire; that he is not familiar with the Landlord, although he knew the Landlord's name; that he only had a brief interaction with the Landlord after the fire; that as a group they were at HPD and he was calling to inquire about re-entry; that his contact with the Landlord was a phone call; that he paid $800 in rent; and that no representative of a landlord ever said he was not paying rent. Petitioner #1 testified on cross-examination that

he had a written month-to-month lease with Petitioner #7, his significant other; that he did not have the lease; that he found out about the rental online; that when he replied, he met a mix of people including Petitioner #6, although not the Occupant; that that group of people gave him the lease; that he paid one month's rent and a security deposit of $200 payable to Petitioner #6; that he was not aware of who the landlord was at the time of signing the lease; that he did not think that Petitioner #6 owned the subject premises; that he understood it to be an organization or a group and a group lease with a landlord; and that he did not think he had a sublease, but just a lease.

Petitioner #4 testified that she moved into a particular room in the subject premises in May of 2018; that she did not have a relationship with the Landlord much; that she tried to but it did not work out; that she understood the Landlord to be the owner of the subject premises; that they tried to set up communication with the Landlord in December of 2018; and that the Landlord did not show up. Petitioner #4 testified on cross-examination that she had no written lease; that Petitioner #6 rented the room to her; that they met through the Prior Occupant, who gave her the Prior Occupant's old room; that she met Petitioner #6 before she moved into the room; that she came to an agreement with Petitioner #6 that the rent for her room would be $700; that she paid the $700 and a $200 security deposit by Venmo to Petitioner #6; that sometimes she paid with Venmo and with cash but everything is on Venmo in some form; and that she got statements from Venmo showing payments to Petitioner #6.

Respondents introduced into evidence a document showing that there is a mortgage on the subject premises for $800,000 and records from the New York City Department of Finance, showing property tax payments billed and paid quarterly from June of 2019 through March of 2021 at annual rates of $4,392.24 and $4,367.00. Respondents introduced into evidence a

summons and complaint concerning litigation commenced in 2020 between Respondents and their insurance companies.

Respondents introduced into evidence a fire marshal's report, which states that the marshal was unable to determine cause of the fire; that the subject premises is an illegally converted multiple dwelling; that the fire originated in combustible material, i.e., an extension cord and paper in the room of origin; that there was a statement of a tenant that the tenant was using electricity from an adjacent room, which an examination confirmed; that a surge protector and wiring was found in the scene of the origin of the fire; and that Petitioner #2 told the fire marshal that he had no electricity in his room and used an extension cord to plug in a phone, lamp, and computer.

Domenick Callegari, Respondents' former counsel ("Respondents' former counsel") testified that he knows of these proceedings; that he first appeared on behalf of Respondents on November 16, 2020; that Respondents first retained him in August of 2020; and that he retained expert witnesses, including a construction company who provided an estimate. Respondents introduced into evidence the estimate from the construction company, dated February 21, 2021, which estimates that a restoration of the subject premises would cost $417,000.

Alberto Roman ("the Engineer") testified that he has been a professional engineer in New York State since 2015; that he is also licensed in ten other states; that he holds a B.S., an M.S., and a Ph.D. in mechanical engineering and structural engineering; that he is self-employed; that the name of his business is AR Tech Engineering, PC; that he established his business four or five years ago; that he inspected the subject premises on March 9, 2021; that when he was there he examined and analyzed the damages that the fire caused; that he noticed several structural issues caused by the fire; that the subject premises is three stories tall; that the structure is

masonry with wood joists; that the wood joists were severely damaged; that the load-bearing walls were damaged; that the subject premises is not safe; and that he went to each floor and took pictures of everything.

Respondents introduced the Engineer's report, dated March 29, 2021, into evidence. The report says that interior collapse is of immediate concern; that there is severe damage to load-bearing walls; that cracking noises indicate that structural components are failing; that he recommended shoring-up plans; that the subject premises is unsafe; that a wood load-bearing wall is not structurally sound; and that a replacement of wood joists is needed.

The Engineer testified that the wood joists were black; that some parts were missing; that if the joists are damaged then their ability to carry the weight of the load is compromised; that he examined the stairways; and that he would not allow tenants to go back in.

The Engineer testified on cross-examination that "shoring" is a process to temporarily support a building; that shoring is done by steel posts and wood joists; that shoring would make the subject premises more secure; that shoring is a standard practice in New York City; that it is possible to shore up the subject premises; that even if the subject premises is shored, it would not be safe; that it would be temporarily safe; and that if you are going to shore up the subject premises, it should be done with a lot of caution.

Discussion: Petitioners' standing

Even though the Court has already entered into an order to correct, it has done so on HPD's case against Respondents and not on Petitioners' case against Respondents. Thus, while an additional order to correct may at first glance appear to be duplicative, the effect of such an additional order would be to confer a remedy upon Petitioners upon any hypothetical

noncompliance separate from HPD's remedies. The parties dispute whether Petitioners have the standing to obtain such relief.

A "lawful occupant" of housing has standing to obtain relief in an HP proceeding. N.Y.C. Admin. Code §27-2115(h)(1). The Court must construe a statute so as to give effect to every word therein to the extent possible. Matter of Mestecky v. City of N.Y., 30 N.Y.3d 239, 243 (2017), Kamchi v. Weissman, 125 A.D.3d 142, 153 (2nd Dept. 2014), Matter of Tristram K., 36 A.D.3d 147, 151 (1st Dept. 2006). With this canon in mind, the statute's use of the words "lawful occupant" instead of "tenant" is significant, reflecting a deliberate choice to expand the standing of HP proceeding petitioners beyond tenants of record only. See Myers v. Schneiderman, 30 N.Y.3d 1, 12 (2017), Matter of Shannon, 25 N.Y.3d 345, 352 (2015), Matter of Raynor v. Landmark Chrysler, 18 N.Y.3d 48, 56 (2011), Town of Riverhead v. N.Y. State Bd. of Real Prop. Servs., 5 N.Y.3d 36, 42-43 (2005)(where a law expressly describes a particular thing to which it shall apply, the Court must draw an "irrefutable inference" that the Legislature intended to omit or exclude what the Legislature omitted or excluded). Accordingly, Petitioners do not necessarily have to be tenants to have standing, so long as they prove that they are lawful occupants of the subject premises.

A reported case, Gavriyelov v. Appeldorn, 2017 N.Y.L.J. LEXIS 1315, *5 (Civ. Ct. Kings Co.), decided May 10, 2017, addresses the status of the subject premises. The Court in that matter found, *inter alia*, that the then-lessor of the subject premises ("Respondents' predecessor-in-interest") did not dispute that the subject premises was subject to the Rent Stabilization Law; that the Occupant moved into a room in the subject premises as a rent-regulated SRO tenant; that Respondents' predecessor-in-interest failed to dispute that the Occupant paid rent only for his room; that Respondents' predecessor-in-interest failed to dispute

that the subject premises is a multiple dwelling with 10 class "B" units,[6] that the subject premises is an SRO building according to DOB and the certificate of occupancy, with ten furnished rooms, two community kitchens, one living room and one kitchen; that the then-occupants of the subject premises were all tenants with individual rooms who shared communal facilities such as the bathroom and kitchens; and that the then-occupants of the subject premises maintained separate households and separately paid rent to Respondents' predecessor-in-interest. Id.

Given that the subject premises is an SRO, Petitioners cite Smiley v. Williams, 26 Misc.3d 170, 174 (Civ. Ct. N.Y. Co. 2009) for the proposition that the hotel provisions of the Rent Stabilization Code apply to the subject premises. Respondents cite John Manning Irrevocable Tr. v. Biggart, 2019 N.Y. Slip Op. 31256(U)(S. Ct. N.Y. Co.) for the opposite proposition that, without indicia of hotel living, like linen services, the hotel provisions of the Rent Stabilization Code do not apply. However, the Court in John Manning Irrevocable Tr., supra, 2019 N.Y. Slip Op. at 31256(U), distinguished Smiley, supra, 26 Misc.3d at 170, on the ground that the premises in John Manning Irrevocable Tr. was an "ordinary apartment" as opposed to an SRO unit. Respondents herein do not dispute that the units in the subject premises were rooms without bathroom or kitchen facilities in them, as SRO units are, and thus not "ordinary apartments."

The Rent Stabilization Code defines a "hotel" as a dwelling which provides a battery of services, 9 N.Y.C.R.R. §2520.6(b), services which 9 N.Y.C.R.R. §2521.3 sets forth. And, indeed, 9 N.Y.C.R.R. §2521.3(a) does list services that hotel accommodations provide. However, 9 N.Y.C.R.R. §2521.3(c) goes on to say that notwithstanding the provision of 9

[6] "B" dwellings are those "occupied, as a rule transiently ... includ[ing] hotels, lodging houses, rooming houses, boarding houses ...." MDL §4(9).

N.Y.C.R.R. §2521.3(a), SRO facilities such as hotels or rooming houses shall be included in the definition of hotel as set forth in 9 N.Y.C.R.R. §2520.6(b) for "all other purposes of th[e Rent Stabilization] Code."[7] Accordingly, the subject premises' lack of hotel services like linen services does not detract from its classification as an SRO as provided in Gavriyelov, supra, 2017 N.Y.L.J. LEXIS at 1315, and the hotel provisions of the Rent Stabilization Code therefore apply to the subject premises.

Occupants of dwellings subject to the hotel provisions of the Rent Stabilization Code for six months or more are "permanent tenants," 9 N.Y.C.R.R. §2520.6(j), Kanti-Savita Realty Corp. v. Santiago, 18 Misc.3d 74 (App. Term 2nd Dept. 2007), even if they entered the premises as licensees. PR 307 W. 93, LLC v. Peralta, 59 Misc.3d 141(A)(App. Term 1st Dept. 2018), 222 E. 12 Realty LLC v. McNally, 2016 N.Y.L.J. LEXIS 4854, *6-7 (Civ. Ct. N.Y. Co.), *aff'd*, 59 Misc.3d 127(A)(App. Term 1st Dept. 2018). To the extent that Petitioners testified that they lived in the subject premises for at least six months, then, they would be permanent tenants protected by the Rent Stabilization Laws.

Respondents raise two possible issues with Petitioners establishing permanent tenant status. First, some of Petitioners may have lived at the subject premises for less than six months at the time of the fire. Second, Petitioners' only proof that they lived in the subject premises for the time that they did was their testimony.

With regard to the first issue, a vacate order does not terminate a tenancy. Eyedent v. Vickers Management, 150 A.D.2d 202, 204 (1st Dept. 1989), *citing* Matter of Department of Bldgs. (Philco Realty Corp.), 14 N.Y.2d 291, 302 n.2 (1964), Garber v. Egger, 132 N.Y.S.2d 371

[7] One exception, which does not apply to any issue before the Court, is that a landlord is not required to provide hotel services to the tenants unless such services were provided on applicable base dates.

(App. Term 1st Dept. 1954). On this principle, if a vacate order was the only reason why occupants of SRO units did not live in a building for a full six months, there is an argument that the vacate order should not count against those occupants for purposes of determining "permanent tenant" status as per 9 N.Y.C.R.R. §2520.6(j). Be that as it may, the Court need not determine the legal issue of the effect of a vacate order on a six-month residency in an SRO, as the Court does not need to determine that Petitioners are tenants, only that Petitioners are lawful occupants. See Fashion Training Co. v. Fulton County Elec. Contractors, 142 A.D.2d 465, 468 (3rd Dept. 1989)(Courts are constrained to make determinations on the narrowest ground possible).

Authority regarding standing to commence a lockout proceeding informs the Court's determination as to what constitutes "lawful occupancy." In order to commence a lockout proceeding a petitioner needs to show that she had been in "possession" of the premises to which she is seeking restoration. RPAPL §713(10). To an extent at least, licensees do not have the requisite "possession" that tenants have to obtain relief on a lockout. Zhu v. Li, 70 Misc.3d 139(A)(App. Term 2nd Dept. 2021). However, a colorable claim to a tenancy, either according to the regulations that apply to the New York City Housing Authority, Alvarado v. N.Y.C. Hous. Auth., 2006 N.Y. Misc. LEXIS 2852 (Civ. Ct. N.Y. Co. 2006), or according to succession provisions of apartments subject to Rent Stabilization, Rostant v. 790 RSD Acquisition LLC, 21 Misc.3d 138(A)(App. Term 1st Dept. 2008), Banks v. 508 Columbus Props., 8 Misc.3d 135(A)(App. Term 1st Dept. 2005), Dixon v. Fanny Grunberg & Assoc., LLC, 4 Misc.3d 139(A)(App. Term 1st Dept. 2004), confers standing to commence a lockout on the claimant to the tenancy. If an occupant with a colorable claim to a tenancy satisfies the standard of proving the possession necessary for standing to commence a lockout proceeding, then a similarly

colorable claim satisfies the lesser burden of proving a "lawful occupancy." To the extent that some Petitioners may have lived in the subject premises for less than six months before the vacate order, the effect of the vacate order on their claim to be permanent tenants establishes a claim colorable enough to render their occupancy of the subject premises to be lawful.

Similar logic applies to the question of Petitioners' proof of their occupancy. While testimony by itself is not the strongest evidence of occupancy, nothing in Petitioners' testimony appeared to lack credibility and, despite testimony about interactions with someone affiliated with Respondents, Respondents did not rebut Petitioners' testimony. As the Court is only tasked with determining whether Petitioners are "lawful occupants," their unrebutted testimony suffices. Accordingly, without prejudice to any disputes over Petitioners' status as tenants, Petitioners have proven that they have the standing to obtain relief in this HP proceeding.

Discussion: Temporary Access

Besides an order to correct, Petitioners seek an order of this Court directing Respondents to provide them with temporary access to the subject premises. Respondents' unrebutted evidence showed that the structural unsoundness of the subject premises renders access, even temporary access, by nonprofessionals to be too dangerous to risk whatever injuries may result from an order of this Court directing that Petitioners have access.

Petitioners ask the Court to direct Respondents to shore up the subject premises to address the danger. However, the law tasks Housing Court with the enforcement of housing standards. New York City Civil Court Act §110(c). Petitioners do not connect their request with the enforcement of housing standards and no discernible authority makes such a connection. Indeed, the relief Petitioners seek could actually detract from the Court's core mission of enforcement of housing standards. If Respondents' evidence of litigation with their insurance

carrier demonstrates nothing else, it demonstrates that Respondents are operating with finite resources. Ordering Respondents to shore up the subject premises would divert those limited resources from the correction of violations at the subject premises.

Discussion: Respondents' Defenses

Respondents interposed an answer verified on October 2, 2019.[8] The answer raised three defenses: that Respondents were in the process of applying for a "certificate of non-harassment"; that Respondents have been "hamstrung" by the delay of their insurance company's evaluation of their fire claim; and that Respondents have retained experts to determine the extent of the damage. The few defenses to an order to correct include lack of standing or jurisdiction, completed repairs, that conditions are not code violations, that notice of violation is facially insufficient, that the respondent is no longer the owner, and economic infeasibility. D'Agostino v. Forty-Three E. Equities Corp., 12 Misc.3d 486, 489-90 (Civ. Ct. N.Y. Co. 2006), *aff'd on other grounds*, 16 Misc.3d 59 (App. Term 1st Dept. 2007), Steinberg v. Parkash, 71 Misc.3d 1225(A)(Civ. Ct. Bronx Co. 2021) Morales v. 1160 Cromwell Crown LLC, 2021 N.Y. Slip Op. 50748(U)(Civ. Ct. Bronx Co.), Parrales v. 800 Realty LLC, 69 Misc.3d 1219(A)(Civ. Ct. Bronx Co. 2020), Beltre v. Carroll Place Assocs. LLC, 69 Misc.3d 1215(A)(Civ. Ct. Bronx Co. 2020), Morales v. Balsam, 69 Misc.3d 1204(A)(Civ. Ct. Bronx Co. 2020), Allen v. 219 24th St. LLC, 67 Misc.3d 1212(A)(Civ. Ct. N.Y. Co. 2020), Vargas v. 112 Suffolk St. Apt. Corp., 66 Misc.3d 1214(A)(Civ. Ct. N.Y. Co. 2020), Castillo v. Banner Grp. LLC, 63 Misc.3d 1235(A)(Civ. Ct.

[8] Respondents' trial counsel, who was the third attorney of record to appear for Respondents in this proceeding, moved for relief regarding an answer that showed an unawareness of the previously-interposed answer, which was understandable given the limitations on scanning cases recently converted to e-filing and the COVID-19 pandemic has placed on access to the Court.

N.Y. Co. 2019). None of the defenses in Respondents' answer are cognizable defenses to an order to correct. Accordingly, the Court dismisses these defenses as regards an order to correct.

Even though Respondents did not plead economic infeasibility, Respondents ask the Court to conform the pleadings to the proof to consider such a defense. Assuming *arguendo* that the Court would grant such a motion, "economic infeasibility" means that the cost to repair a building exceeds its value after the repair, Hous. & Dev. Admin. v. Johan Realty Co., 93 Misc.2d 698, 703 (App. Term 1st Dept. 1978), Farrell v. E.G.A. Assocs., Inc., 9 Misc.3d 1118(A)(Civ. Ct. N.Y. Co. 2005), 153-155 Essex St. Tenants Ass'n v. Kahan, 4 Misc.3d 1008(A)(Civ. Ct. NY Co. 2004), which Respondents bear the burden of proving by a preponderance of evidence. Buchanan v. Toa Construction Corp., N.Y.L.J., May 31, 1989, at 29:1 (App. Term 1st Dept.), *leave to appeal denied*, N.Y.L.J., November 24, 1989 (1st Dept.), Lamberty v. Peter Papamichael & Pandyland, 2013 N.Y.L.J. LEXIS 7380 n.1 (S. Ct. Kings Co.). While Respondents introduced evidence that a correction of the violations would cost $417,000, Respondents did not introduce any evidence that the market value of the subject premises after a repair would be less than $417,000.[9] Even if the Court were to grant Respondents' application, then, Respondents have not proven economic infeasibility as the law defines it.

Discussion: Civil Penalties

The violations in evidence are prima facie proof of the conditions, MDL §328(3) and, in any event, Respondents never disputed the existence of conditions or the vacate order.

[9] In fact, Respondents introduced into evidence a link the Court copies and pastes below, showing property tax information for the subject premises. The link on the page "2021-22 final" for "Market Values & Assessments" lists the current estimated market value of the subject premises as $2,188,000: https://a836-pts-access.nyc.gov/care/datalets/datalet.aspx?mode=acc_hist_det&UseSearch=no&pin=3019880017&p.jur=065&taxyr=2021

Respondents never alleged that they corrected any violations. Affidavits and records that HPD introduced into evidence pursuant to N.Y.C. Admin. Code 27-§2115(b) show proof of mailing of notices of violation to Respondents. HPD has therefore satisfied its prima facie burden of showing an entitlement to civil penalties.

An owner has a defense to civil penalties upon proof that someone who was not in the owner's control caused the violation. N.Y.C. Admin. Code 27-§2116(b)(2)(iii). Respondents argue that the fire marshal's report shows that, to an extent that an occupant of the subject premises used an extension cord because he had no electricity in his room and that a surge protector and wiring was found at the origin of the fire.

As a threshold matter, Respondents did not raise the act of another a defense to civil penalties in their answer. Moreover, even assuming *arguendo* that the Court considered such a defense, the fire marshal's report specifically states that the marshal was unable to determine the cause of the fire.

Most importantly, violation report in evidence shows that the subject premises has ten "B" units. Every "B" unit, to be clear, is a separate dwelling unit unto itself. Assuming *arguendo* that an occupant of the subject premises had no electrical service in a separate dwelling unit, efforts to provide electricity to that dwelling unit are not unreasonable. Tenants who adjust to inadequate electricity by using extension cords and surge protectors do not, as a matter of law, indulge in a lifestyle that is "beyond the reasonable needs of any modern tenant." Daly v. 9 E. 36th LLC, 153 A.D.3d 1145, 1147 (1st Dept. 2017). Accordingly, Respondents do not satisfy their burden of either pleading or proving that an act of another caused the violations that HPD seeks civil penalties for.

An owner can also show a defense to civil penalties upon showing that the owner promptly began to correct the violations but an inability to obtain necessary funds prevented the correction of the condition. N.Y.C. Admin. Code 27-§2116(b)(2)(ii). As noted above, Respondents' answer includes a defense that the delay of their insurance company's evaluation of their fire claim "hamstrung" them. Such a pleading, while inartful, gives HPD and Petitioner adequate notice of an inability to obtain necessary funds.

Respondents' proof consisted of documentation of litigation between Respondents and their insurance carrier, a somewhat thin corpus of evidence. The Court considers this evidence, however, in the context of the scale of the task before Respondents: to restore Petitioners to their homes after a fire serious enough to render the subject premises as unsafe to even temporarily visit as the Engineer set forth. In, again, a world of finite resources, layering civil penalties on top of the expenses that a correction of the violations entail can foreseeably delay the core goal of this litigation, to correct the condition and enable Petitioners to regain their homes.

If the Court finds that sufficient mitigating circumstances exist, the Court may remit all or part of any penalties arising from the violation, but may condition such remission upon a correction of the violation within a time period fixed by the court. N.Y.C. Admin. Code §27-2116(b). Under the particular circumstances presented to the Court on this case, the Court finds that such forbearance is appropriate, albeit subject to an injunction that Respondents actually correct the conditions that precipitated the vacate order in the first instance.

Accordingly, it is

ORDERED that the Court dismisses Respondents' defenses to an order to correct; and it is further

ORDERED that the Court directs Respondents to correct the Violations and the conditions sufficient to effectuate a lifting of the vacate order placed by HPD and DOB on or before December 31, 2021; and it is further

ORDERED that the Court remits civil penalties, subject to N.Y.C. Admin. Code §27-2116(b), conditioned on Respondents' compliance with the Court's directive that Respondents effectuate a lifting of the vacate order on or before December 31, 2021; and it is further

ORDERED that on default of the directive of the Court, HPD and/or Petitioners may move for appropriate relief including, but not limited to, a revocation of the remission of civil penalties, additional civil penalties to date, and/or contempt; and it is further

ORDERED that the Court dismisses Petitioners' cause of action for temporary access to the subject premises, without prejudice to renewal if a change in circumstances warrants such relief; and it is further

ORDERED that Respondents may move for an extension of deadline of December 31, 2021 set by the Court, conditioned on such a motion being made before the deadline of December 31, 2021 and conditioned upon a showing of good cause and diligent efforts to comply with the Court's order.

This constitutes the decision and order of the Court.

Dated: August 16, 2021
Brooklyn, New York

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HON. JACK STOLLER
J.H.C.