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Ramirez v Lum
2021 NY Slip Op 51211(U) [73 Misc 3d 1231(A)]
Decided on December 16, 2021
Civil Court Of The City Of New York, Kings County
Capell, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on December 16, 2021

Civil Court of the City of New York, Kings County

Antonio Ramirez, Petitioner-Tenant,

against

**Lily Lum, Lin Lum, Lums 54 St LLC, Respondent-Landlord, The
Department of Housing Preservation and Development of the City
of New York, Respondent-HPD.**

Index No. L & T 307015/20

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Heela D. Capell, J.

Antonio Ramirez, ("Petitioner") commenced this proceeding on November 13, 2020, alleging, *inter alia*, that violations of the Housing Maintenance Code, Multiple Dwelling Law, and other applicable housing standards exist at 214 54th Street, Apartment 1F Brooklyn, NY 11220 ("Premises") and that Lily Lum ("Ms. Lum"), Lin Lum, and 54 St LLC (collectively, "Respondents") harassed him per the New York City Administrative Code § 27-2005(d).

Petitioner requests that this court issue violations against Respondents for conditions including, "a defective electrical system with frequent sparks and electrical shorts, holes around the electrical outlets, and corroded wiring, presenting a serious risk of fire; windows which do not open, leaving Petitioner and his daughter without a second means of egress in the event of fire; uneven floors; mold; and an infestation of cockroaches." Petitioner also seeks an order directing Respondents to correct the violations, finding that Respondents harassed him, and penalties associated with the harassment finding. Respondents filed an Answer, asserting general denial, retaliation, lack of notice of the conditions, that all repairs are complete, and that [*2]Petitioner has abandoned his tenancy. Respondents withdrew their defense alleging improper service prior to trial.

The court took judicial notice of the contents of the court file, including the judicial inspection request; the inspection reports returned by the New York City Department of Housing Preservation and Development ("HPD") listing the then existing violations at the Premises (NY St Cts Elec Filing [NYSCEF] Doc No. 11, 15); a nonpayment proceeding commenced by Respondents against Petitioner under Index Number L & T 301688/20 ("Nonpayment"), and the contents of that court file; that the Nonpayment was filed on September 1, 2020; and that this case first appeared in court on December 11, 2020.

Petitioner testified on his own behalf. He explained that he had resided at the Premises since 2012, but currently resides in an apartment on Staten Island, New York ("S.I. Apt."). Petitioner asserted that he rented the S.I. Apt. on July 28, 2020 and moved in on August 1, 2020. Petitioner maintained that many repairs were required at the Premises. He explained that the ceiling in the bathroom on the second floor was damaged, near the lights, and the wires on these lights did not have protective covering. Petitioner noticed this condition about three years ago when repairs were being made to his bathroom. At that time, he observed sparks in the bathroom and that his television was damaged. Petitioner did not state exactly when this occurred. Petitioner also testified that an electrical outlet in the living room was "burnt" around two and a half years ago and that there is some space in the wall around the outlet. He added that the Premises regularly lacks sufficient heat, the windows throughout the

Premises either do not open or do not stay open, there are holes in the floor and there is mold in the kitchen.

Petitioner testified that he informed Respondents about these conditions, but did not provide any proof in support of that testimony. He also did not support his testimony with dates or factual details, including who he informed of the conditions, when this was done and how he informed Respondents of the conditions. Petitioner conceded that he does not remember giving written notice of the conditions to the Respondents. Petitioner recounted that Ms. Lum told him that the Premises were on the verge of collapsing. He began withholding rent in March 2020 because the Premises were so damaged that "no one should have to pay for that," but remained in the Premises until the end of July 2020.

Petitioner introduced into evidence a text between himself and Ms. Lum dated July 17, 2020 wherein she requested he move out of the Premises because conditions at the Premises were dangerous (Pet Ex. T). The text message reads as follows: Ms. Lum: "You have a lot of water drop down to the BSM" Petitioner: "Well, fix your floor. And change all the bathroom walls." Ms. Lum: "Subject: The apartment is dangerous. Can not (sic.) rent it like this. I just spoke to the police [a]bout this. Mr. Antonio please find a place to move ASAP if you can. I will let my lawyer know[]." (Pet Ex. T). Mr. Ramirez explained that after receiving the message, he called 311 and eventually found the S.I. Apt. He moved out of the Premises and began paying rent for the S.I. Apt. in August 2020 but hoped Ms. Lum would eventually make the repairs so that he could move back in. Petitioner did not give written notice to any of the Respondents that he was moving out.

Petitioner conceded that Respondents have made repairs to the Premises. Some of the windows have been repaired, the mold in the kitchen was addressed, and Respondents tried to repair the living room window but it is now "too high." Petitioner also asserted that the Respondents made other repairs in the Premises in March 2021 but he does not recall the exact date.

Lily Lum testified on behalf of Respondents. She maintained that prior to the summer of 2020, Petitioner never notified Respondents about repairs at the Premises aside from a few complaints about lack of heat several years ago. She also testified that in 2019 she put a "new kitchen" into the Premises. She stated that HPD notified her that there was an issue with the windows, in November 2020, but that she never received notice from Petitioner. After receiving notice from HPD, she called Petitioner and asked to arrange access for repairs. Respondents immediately repaired one of the windows which was shut too tightly. She

remembered that this work was done on December 16 or 17 of 2020. She also recalled that she hired an exterminator who came to the Premises on December 5, 2020.

Ms. Lum also arranged for repairs to be made pursuant to an order dated January 7, 2021, signed by the Honorable Kenneth Barany (NYSCEF Doc No. 24). She installed a new floor, remediated mold, and repaired the windows on the first day of access. On the second day of access, Ms. Lum installed two new doors and painted the Premises throughout. Ms. Lum asserted that all of the violations dated December 5, 2020 (NYSCEF Doc No. 11), have been addressed. She testified that Petitioner made a separate request for repairs and that she made those repairs as well. She claimed that she was not aware of any violation for the electrical system, and is not aware of any conditions that need to be repaired now. Ms. Lum maintained that she was aware of a violation for an electrical cord and for defective outlets in the Premises. She explained that she did not put the extension cord there, and that she did not install any wire to or from the television.

Ms. Lum asserted that she has had issues gaining access to the Premises. She cited as an example July or August of 2020, when the bathtub at the Premises was flooding. Petitioner was living in the Premises at that time but would not let her in. She stated that she finally went to see the bathroom on August 22, 2020. She recalled that access was arranged from 12:00pm to 4:00pm but Petitioner "made her leave" after one hour and told her he would take care of the repair himself. Afterwards, she checked the bathroom and the leak had been abated. Ms. Lum asserted that this denial or delay of access to repair was a recurring issue, though she did not testify about other specific instances. She testified that she sent letters and text messages to Petitioner requesting access, and requested access in court.

Ms. Lum denied ever asking Petitioner to leave the Premises. She recalled that he stopped paying rent, and she responded that if he continued to refuse to pay rent, she would take him to court. The court found Ms. Lum's ability to recall specific dates, times and details of the repair process persuasive and that overall she was a credible witness.

Petitioner called as his witness Giuseppe Privitera, who performs electrical work for Knight Electrical Corp. The court did not certify Mr. Privitera as an expert, despite Petitioner's request. Mr. Privitera described himself as a "journeyman," which he defined as "someone who is able to complete an electrical job for someone who owns a business." The witness explained that he is neither a licensed electrician nor engineer and that a foreman is obligated to "check up on him." His employer at Knight Electrical Corp. is a licensed engineer.

Mr. Privitera also runs his own company, Tera. Tera does not employ a licensed electrician, nor does Mr. Privitera work as a licensed electrician. Mr. Privitera also does not promote himself as a licensed electrician. Mr. Privitera explained that he is familiar with "some" building and electrical codes, but he was not able to cite any relevant codes to the court at trial. The witness also testified that he primarily works on commercial rather than residential systems.

The court recognizes, however, that "[t]he trial court is not required to formally certify or qualify a witness as an expert (*People v Boyce*, 281 AD2d 554 [2d Dept 2001]; *People v Leung*, 272 AD2d 88, [1st Dept 2000]; *People v Gordon*, 202 AD2d 166, [1st Dept 1994]). It is unnecessary to "proffer" or "tender" the witness as an expert" in order to consider the individual's testimony. (*Id.*) The court notes that Mr. Privitera received basic electrical training and has worked for 14 years on over 1000 residential and 100 commercial units. The court allowed Mr. Privitera to testify at trial and found his testimony to be relevant.

Mr. Privitera inspected the "electrical panel, a couple of outlets and switches and light fixtures" at the Premises on March 13, 2021. He testified that he noticed potential fire hazards throughout the Premises due to the electrical box or electrical wiring. For example, he asserted that the electrical box, lack of an outlet in the bathroom, wiring in the light fixtures, lack of GFCI outlets, use of cloth wire and lack of three pronged outlets were issues. However, the witness could not explain how any of these conditions were a violation of any electrical, building or housing codes or standards. He conceded that he did not research the electrical code prior to the inspection, nor did he state that he is familiar with older electrical systems. He conceded that it was possible that the "old" wiring and two-pronged outlets were compliant with the code that existed at the time they were installed. The witness also maintained that Petitioner informed him he had been using extension cords in the apartment but that he did not observe any on the day of the inspection.

The Law and its Application

Civil Court Act section 110(a) confers upon the Court the jurisdiction to render determinations relating to maintenance of housing standards ([see e.g. *Allen v 219 24th St. LLC*, 67 Misc 3d 1212\[A\]](#), [Civ Ct, New York County 2020]; [citing *Vargas v 112 Suffolk St. Apt. Corp.*, 66 Misc 3d 1214\[A\]](#), [Civ Ct, New York County 2020]). Furthermore, the Civil Court Act provides that Housing Court may "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 . . ." (*Id.*).

Absent a violation of "housing standards," however, the court may not order pre-emptive replacement of otherwise code compliant equipment (*see e.g. Parkchester Alliance v Parkchester Apts. Co.*, 180 Misc 2d 548 [Civ Ct, Bronx County 1999]). In *Parkchester*, the petitioners sought to replace the building's often faulty but code compliant plumbing system (*Id.*). The court held that it could not order the building's owner to replace the entire system because there were no outstanding violations for the system. Notably, the plumbing pipes were determined to be outdated at the time of inspection, but had been compliant with building codes at the time of construction (*Id.*). The Appellate Term, Second Department similarly held that a "remedy for a violation cannot be required before the violation has been proven" ([Grant v NYCHA, 59 Misc 3d 136](#)[A], 2018 NY Slip Op 50514[U] [App Term 2018]).

Ordinarily, a violation issued by HPD is *prima facie* proof that a condition exists and must be remedied (*Department of Hous. Preserv. & Dev. v Thomas*, 2021 NY Slip Op 32566[U] [Civil Ct, Kings County 2021]). Here, however, HPD records do not contain any open violations against the Premises with respect to the electrical system or electrical work. Accordingly, Petitioner bears the burden of proving that the electrical system at the Premises violates applicable codes, which would warrant the issuance of a violation. Courts have held that expert testimony is sufficient to meet this burden (*see Allen*, 67 Misc 3d 1212[A]).

Contrary to *Allen*, where the expert was a licensed engineer who provided specific [*3] examples of code violations in his report, Mr. Privitera's testimony did not sufficiently demonstrate knowledge of the relevant building, electrical or housing standards and codes, and whether the electrical system at the Premises was in compliance with these standards and codes. Mr. Privitera's testimony included several recommendations for improvements that could be made to the electrical system, but not whether the electrical system, wiring or outlets at the Premises violated the relevant New York City codes. Accordingly, Petitioner failed to meet the burden of proving that this court should issue any violations with respect to the electrical outlets, system, or wiring, at the Premises. An HPD inspector examined the Premises on the same day as Mr. Privitera and found only one electrical violation, which has been resolved (NYSCEF Doc No. 15). In fact, as of December 14, 2021, HPD's electronic database shows only one open violation, dated March 13, 2021, for inoperative entry doors at the Premises. Respondent credibly testified that she replaced these doors during a recent visit where multiple repairs were made, and Petitioner did not offer testimony in rebuttal.

Harassment

The New York City Administrative Code § 27-2005(d) forbids the owner of a dwelling from harassing "any tenants or persons lawfully entitled to occupancy of such dwelling" as per § 27-2004(a)(48). The enactment of this legislation "created a new cause of action . . . to address a perceived effort by landlords to empty rent-regulated apartments by harassing tenants into giving up their occupancy rights" (*Aguaiza v Vantage Props., LLC*, 893 NYS2d 19, 20 [1st Dept 2010]; *see also Prometheus Realty Corp. v City of NY*, 11 NYS2d 299, 300 [1st Dept 2010]). Administrative Code § 27-2115 allows for a private right of action based on a claim of harassment (NYC Admin. Code 27-2115[h]).

"Harassment" is defined as: "any act or omission by or on behalf of an owner that (i) causes or is intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy, and (ii) includes one or more of the following acts or omissions, provided that there shall be a rebuttable presumption that such acts or omissions were intended to cause such person to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy..." (NYC Admin. Code 27-2004[a][48]). The Code lists specific acts or omissions which can form the basis for a finding of harassment.

Proof that an owner violated a section of this statute, gives rise to a "rebuttable presumption that such acts or omissions were intended to cause [the tenant] to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy" (NYC Administrative Code 27-2004[a][48][ii]). The burden then shifts to the owner "to rebut the presumption that such acts or omissions were intended to cause plaintiffs to vacate or surrender their occupancy rights" (*Cartagena v Rhodes 2 LLC*, NY Slip Op 30290[U] [Sup Ct NY Co 2020]). Administrative Code § 27-2115 [m][2] provides that "upon a finding of harassment, the court shall impose a civil penalty of not less than \$2,000 and not more than \$10,000." (*Id.*)

Petitioner did not meet his burden to establish that Respondents engaged in prohibited harassment in this case, namely, the repeated failure to make repairs over a lengthy period of time, forcing him to vacate, repeated interruptions of essential services, and *inter alia*, damaging the Premises and Petitioner's personal property (*see* NYSCEF Doc. No. 1). Rather, Petitioner concentrated the bulk of his testimony on the electrical system. Petitioner offered limited proof of any communication between the Respondents and himself and could not

provide the court with dates or times on which he complained to Respondents about repairs. Petitioner also [*4]conceded he did not request repairs in writing. Petitioner alleges that there are current violations at the Premises. However, after repeated inspections, neither HPD nor DOB have found any currently existing violations, aside from HPD's violation for inoperative doors, which Ms. Lum credibly testified were replaced. In addition, the court found that Ms. Lum's trial testimony was credible, specifically with respect to correcting the conditions. The court also does not find Petitioner proved Ms. Lum's text message of July 17, 2020 (Pet. Ex T) constituted harassment per the statute, nor did Petitioner provide any further proof in support of his contention that Respondents induced him to vacate the Premises.

As such, and for the foregoing reasons, the petition is dismissed, with prejudice. This decision and order is without prejudice to any other proceeding between the parties, including the Nonpayment.

This constitutes the decision and order of the court.

Dated: December 16, 2021
Brooklyn, New York
Hon. Heela D. Capell
J.H.C.

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