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### Hayes v. Toju Realty Corp.

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[\*1]

<b>Hayes v Toju Realty Corp.</b>
2022 NY Slip Op 22006
Decided on January 3, 2022
Civil Court Of The City Of New York, Kings County
Weisberg, J.
Published by <a href="#">New York State Law Reporting Bureau</a> pursuant to Judiciary Law § 431.
This opinion is uncorrected and subject to revision before publication in the printed Official Reports.

Decided on January 3, 2022

Civil Court of the City of New York, Kings County

**Angela Hayes; Christine Bourdeau, Petitioner,**

**against**

**Toju Realty Corporation, and New York City Department of  
Housing Preservation and Development, Respondents.**

Index No. 6220/2019

Respondent/Movant HPD:

Martha Ann Weithman, Deputy General Counsel of HPD, by M. Paul Gdanski

Respondent Toju Realty:

Law Office of Marc Scolnick, P.C.

Michael Weisberg, J.

The following e-filed document listed by NYSCEF document numbers (motion no. 5) 4-12; 14 were read on this motion for leave to reargue the prior motion.

This is a tenant-initiated "HP proceeding." After trial, the court issued an order (Smith,

J., July 25, 2019) requiring Respondent Toju Realty Corp. to correct specified conditions that violate housing maintenance standards. Respondent Department of Housing Preservation and Development moved for a finding of contempt against Toju and for the imposition of civil [\*2]penalties. [\[FN1\]](#) After a hearing on the motion and the submission of post-hearing memoranda, the court denied the motion by decision order dated April 16, 2021 ([Hayes v Toju Realty Corp., 71 Misc 3d 1122](#), 2021 NY Slip Op 21099 [Civ Ct, Kings County]). HPD has moved for leave to reargue. As forth below, leave to reargue is granted, and upon reargument, the court adheres to its prior decision with respect to contempt, and awards civil penalties.

(The underlying motion for contempt was made by order to show cause dated January 15, 2020. Two weeks early, according to a deed recorded with the Department of Finance, Toju Realty Corp. transferred title of the building to 1495-1499 East 46 Street Corp. Both corporations were apparently owned by a single shareholder, Edwin Gbenebiste. Gbenebiste apparently died shortly after the contempt hearing, and his estate is in probate.)

### *Contempt*

As discussed in its prior decision, this court has concluded that in a tenant-initiated HP proceeding, which culminated in a trial after which the court ordered the owner to correct certain conditions violating the Housing Maintenance Code, there is no basis for HPD to seek to hold the owner in contempt for its failure to comply with the order. The statute that creates a cause of action for a tenant to enforce the Housing Maintenance Code allows the tenant to, in practice, make HPD a party to the proceeding (Administrative Code of City of NY § 27-2115[h] and [i]). However, neither the Housing Maintenance Code nor New York City Civil Court Act § 110 (which is silent on the right of a tenant to seek an order for correction of housing conditions) have anything to say on what HPD's role in such proceedings should be.

Traditionally, where most tenants who commence HP proceedings have appeared *pro se*, HPD has acted, in some sense, as their attorney. The result is often an agreement, using a multi-page form drafted by HPD (that contains many terms that go beyond what a court could order if the proceeding were resolved by trial), signed by the tenant, the landlord, and HPD, and that explicitly gives HPD remedies upon breach. Notably, in these instances HPD has not asserted a cross-claim (which would require leave of court in a special proceeding) and thus has not asserted any cause of action. An owner's agreement to the terms in HPD's form essentially settles certain claims that HPD might have formally asserted without it

having to actually do so.

But where there is no such agreement because the proceeding goes to trial, as here, and HPD has not cross-claimed, HPD's role in the proceeding is nothing more than as a "nominal" party, or a party "in name only." No statute gives HPD any rights or remedies in this context. The right belongs to the tenant to obtain an order "directing the department to appear before the court" (Administrative Code of City of NY § 27-2115[h] and [i]). The reason for the tenant's right to do this can be gleaned from the requirements of the Housing Maintenance Code itself. Although ignored regularly, the statute gives a tenant the right to seek enforcement of the Housing Maintenance Code "should the department fail to issue a notice of violation upon the request of a tenant" (Administrative Code of City of NY § 27-2115[h][1]). In other words, the idea is that if HPD had issued a notice of violation, that notice would result in correction of the condition, because if not the owner would be liable for civil penalties. And if the owner did not correct the condition, the notice of violation would entitle HPD to sue for civil penalties. Ultimately, and ideally, if HPD issued a notice of violation, there ought to be no need for a [\*3] tenant to bring their own suit. Only where HPD did not issue a notice of violation, either because no inspection was made or because it determined that the condition did not violate the Housing Maintenance Code, would a tenant need to sue on their own to enforce the code.

Viewed in this way, it becomes clear that HPD may have utility as a party to a tenant-initiated HP proceeding because of its failure or refusal to find a condition alleged by the tenant to violate the Housing Maintenance Code (or, in the case of § 2115[i], where it *did* issue a notice of violation but failed or refused to seek civil penalties after an owner's failure to correct within the requisite time period). But the effect of the statute is not to make HPD a "co-petitioner," nor is it to give HPD standing to seek to hold the owner in contempt after a trial.

In *Johnson v Atop Roofing & Siding Corp.* (135 Misc 2d 746 [Civ Ct, Kings County 1987], cited by HPD, the court similarly grappled with whether HPD, as a respondent, could move to hold the other respondent, the owner, in contempt, ultimately concluding the opposite as this court. Implicitly acknowledging that the result was less than a certainty and revealing that it had not found any other case on point, the court reasoned that "HPD's general responsibilities for housing code enforcement are so broad, and the need for enforcement so paramount, that HPD should be allowed to make such a motion" (*id.* at 748). This court agrees that HPD's responsibilities for housing code enforcement are broad, and no one would argue with the court's assessment of the need for enforcement. But these factors

do not merit in favor of stepping outside the bounds of usual civil procedure to create a right that the law does not otherwise confer. [\[FN2\]](#)

Nor is the court persuaded by HPD's analogy to *State v Unique Ideas, Inc.* (44 NY2d 345 [1978]). It is true that the Court of Appeals referred to the Attorney General (the "State" in the caption) as a "nominal" party and that there was no dispute that the Attorney General was entitled to seek to hold the defendant in contempt. But unlike here, the Attorney General was the *plaintiff* in that action, which it brought pursuant to its powers specifically granted under Article 22-a of the General Business Law to see an injunction and civil penalties, and that as plaintiff the Attorney General obtained a consent judgment against the defendant. In other words, though the Court of Appeals also uses the word "nominal" to describe the Attorney General, HPD in this case is not at all similarly situated to the Attorney General in *Unique Ideas*. Of course, this court does not dispute that HPD has certain powers to "vindicate the rights of the public." But HPD did not exercise those powers in this case, which was commenced by tenants.

The court has considered HPD's remaining arguments and finds them unavailing. Upon granting leave to reargue, the court adheres to its prior decision denying that branch of HPD's motion for a finding of contempt.

### *Civil Penalties*

HPD is correct that the Housing Maintenance Code requires the assessment of civil penalties even without a motion (Administrative Code of City of NY § 27-2115[h][1] ["upon failure to do so [correct condition within the time set for certifying the correction of violations] it shall impose a penalty"]). Upon granting leave to reargue, the court grants that branch of HPD's motion for the assessment of civil penalties.

Accordingly, it is ORDERED that HPD's motion for leave to reargue the prior motion is granted, and upon reargument it is

ORDERED that the branch of the prior motion seeking a finding of contempt is DENIED; and

ORDERED that the branch of the prior motion seeking assessment of civil penalties is GRANTED; and

ORDERED that HPD shall submit a proposed order for the assessment of civil penalties, which proposed order shall include a detailed calculation.

This is the court's decision and order.

Dated: January 3, 2022

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Michael L. Weisberg, JHC

### Footnotes

**Footnote 1:** Petitioner previously moved for civil penalties and contempt based on Toju's failure to comply with the order, both motions which were granted.

**Footnote 2:** This court was unable to find any other cases on point, in the HP context or in any other.

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