2022-03-17

Department of Hous. Preserv. & Dev. of the City of N.Y. v. Rosenfeld

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Department of Hous. Preserv. & Dev. of the City of N.Y. v Rosenfeld
2022 NY Slip Op 22087
Decided on March 17, 2022
Civil Court Of The City Of New York, Kings County
Poley, J.
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Decided on March 17, 2022

Civil Court of the City of New York, Kings County

Department of Housing Preservation and Development of the City of New York, Petitioner,

against

Juda Rosenfeld 180 E. 18 REALTY CORP a/k/a 180 EAST 18 REALTY CORP BARUCH ROSENFELD, Respondents.

Index No. HP 2806/2019

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Julie Poley, J.

Recitation, as required by CPLR 2219(a):
Notice of Motion and Affidavits Annexed 1
Order to Show Cause and Affidavits Annexed 0
Answering Affidavits 2
Replying Affidavits 3
Exhibits 4
Stipulations 0
Other 0

This is an HP proceeding in which Petitioner Department of Housing Preservation and Development of the City of New York ("HPD") seeks an order to correct all Housing Maintenance Code ("HMC") violations at the property located at 1722 Albemarle Road a/k/a 180 East 18 Street, Brooklyn, New York ("premises"), civil penalties for failure to make timely repairs, civil penalties for false certification of violations, a finding that Respondents committed harassment as defined by the HMC, entering such harassment as a Class "C" hazardous violation, directing Respondents not to engage in any future acts of harassment, directing compliance with Orders to Repair/Vacate Orders, and directing Respondents to provide access for HPD inspections. Respondents Juda Rosenfeld, 180 E. 18 Realty Corp. a/k/a 180 East 18 Realty Corp, and Baruch Rosenfeld (collectively referred to as "Respondents") are the owners of the premises within the meaning of the Housing Maintenance Code.

This proceeding is the first of five (5) in "portfolio-wide litigation" commenced by HPD's Anti-Harassment Unit against properties owned or managed by Juda Rosenfeld a/k/a Judah Rosenfeld and Baruch Rosenfeld. The five (5) proceedings are Index Number HP 2806/19, HP 2818/19, HP 2819/19, HP 696/20 and HP 701/20. The pleadings and legal issues presented in all five (5) proceedings are substantially similar, as is the procedural posture of each case. The Law Offices of Scott D. Gross, who appears for all Respondents, moved for partial summary judgment to dismiss HPD's causes of action concerning harassment and leave to conduct discovery in all five (5) proceedings. HPD opposed each motion, and in turn, argues that upon searching the record HPD is entitled to partial summary judgment on HPD's harassment claim having made *prima facie* showing that Respondents repeatedly failed to timely correct violations and submitted false certifications. As all five (5) pending motions concern the same legal issues, are substantially similar, involve common parties, and no good cause is shown to the contrary, the Court consolidates the motions for disposition herein under the lowest Index Number HP 2806/2019. (*See*, NY City Civ. Ct. Act § 110(b)).

On June 22, 2021, this court heard oral argument and reserved decision on all the pending motions. All Court appearances took place via Microsoft Teams and all parties are represented by counsel.

***Respondents' motion for partial summary judgment*:**

Respondents move for partial summary judgment pursuant to CPLR § 3212. Respondents argue that HPD's causes of action sounding in harassment should be dismissed as a matter of law. The crux of the argument presented in Respondents' consolidated motions is that a cause of action for harassment within the meaning of HMC § 27-2005(d) and HMC § 27-2004(a)(48) is a remedy that is only available to tenants and lawful occupants, not to HPD. Respondents argue that harassment, as defined by the HMC, is a private cause of action and that HPD does not have standing to initiate its own case based on harassment or to seek relief based upon harassment in this proceeding. Therefore, Respondents seek partial summary judgment dismissing HPD's causes of action that concern harassment as *ultra vires*.

HPD opposes and seeks partial summary judgment on the same causes of action. As a preliminary matter, HPD argues that Respondents cannot seek summary judgment on this issue as they failed to raise the defense in their answer. HPD argues that one of their most important tasks is enforcing the Housing Maintenance Code, New York City Administrative Code § 27-2001, and that their broad enforcement power includes seeking injunctive relief against any violation of the HMC, including harassment. As the agency charged with enforcing proper [*2]housing standards, HPD argues they are vested with authority to commence the within proceedings pursuant to NY City Civ. Ct. Act § 110(a)(4) and (a)(9). HPD argues that amendments to the HMC granting tenants and lawful occupants a cause of action for harassment does not limit HPD's inherent authority.

To obtain summary judgment, the moving party has the burden of establishing its cause of action or defense sufficiently to justify judgment in its favor as a matter of law. (*See*, CPLR § 3212(b); *Friends of Animals, Inc. V. Associated Fur Mfrs. Inc.*,390 N.E.2d 298 [1979]). If there is any doubt as to the existence of a triable issue, summary judgment should not be granted. (*Glick & Dolleck, Inc. V. Tri-Pk Export Corp.*, 239 N.E.2d 725 [1968]). As summary judgment is a drastic remedy, "the facts must be viewed in the light most favorable to the non-moving party." (*Vega v. Restani Construction Corp.*, 18 NY3d 499, 503 [2012]). "To grant summary judgment it must clearly appear that no material and triable issue of fact is presented." (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957];

citing, Di Menna & Sons v. City of New York, 301 NY 118 [1950]).

The proponent of summary judgment is required to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of material fact." (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Only upon making of this showing does the burden then "shift to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." (*Id*.)

HPD's preliminary argument, that Respondents cannot seek summary judgment on an unpled defense, is denied as the First Affirmative Defense in Respondents' answer alleges that the petition fails to state a cause of action.

The central issue of whether HPD can maintain a cause of action for harassment as petitioner in the context of an HP proceeding appears to one of first impression. Neither party cites appellate authority that is directly on point to the issue presented.

HMC § 27-2005(d) provides that, "The owner of a dwelling shall not harass any tenants or persons lawfully entitled to occupancy of such dwelling as set forth in paragraph 48 of subdivision a of section 27-2004 of this chapter." HMC § 27-2004(a)(48) defines the term "harassment" as "any act or omission by or on behalf of an owner that 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 further identifies 20 specific acts or omissions that constitute harassment. (*See*, HMC § 27-2004(a)(48)).

Both parties argue that the text of the HMC supports their position and warrants summary judgment in their favor. For example, both parties look to HMC § 27-2120 (Injunctions; mandatory and prohibitory). Respondents direct the court's attention to HMC § 27-2120(b), which provides:

> "Any tenant, or person or group of persons lawfully entitled to occupancy may individually or jointly apply to the housing part of the civil court for an order restraining the owner of the property from engaging in harassment. Except for an order on consent, such order may be granted upon or subsequent to a determination that a violation of subdivision d of section 27-2005 of this chapter has occurred." (See, HMC § 27-2120(b)).

As such, Respondents contend that it is clear from the reading of the code that harassment is a tenant remedy because the code subsection specifically provides that "any tenant, or person or [*3]group of persons lawfully entitled to occupancy" has standing to seek

an order restraining an owner from engaging in harassment. The foregoing subsection leaves out reference to HPD altogether.

HPD counters by pointing to HMC § 27-2120(a), which provides in pertinent part that:

> "The department may institute an action in a court of competent jurisdiction for an order requiring the owner of property or other responsible person to abate or correct any violation of this code, or to comply with an order or notice of the department, or for such other relief as may be appropriate to secure continuing compliance with this code. An action for injunctive relief hereunder may be brought in addition to other sanctions and remedies for violations of the code, or may be joined with any action for such other sanctions and remedies except criminal prosecution." (*See*, HMC § 27-2120(a)).

Relying on HMC § 27-2120(a), HPD argues their department has sweeping authority to institute an action "to abate or correct any violation of this code," including harassment, so it would be superfluous to also reference HPD in subsection (b), which was added at a later date. In other words, HPD argues that whereas tenants or lawful occupants are only granted authority when expressly provided so by statute, such as when subsection (b) was added to the code, HPD, the department responsible for enforcing any violation of the HMC, argues that their agency already has inherent authority pursuant to subsection (a) to enforce any violation of the code, including provisions that are subsequently added to the HMC, such as a cause of action for harassment.

Both parties also look to HMC § 27-2115 (Imposition of Civil Penalties) to support their respective positions. For Respondents, HMC § 27-2115(h)(1) specifically references "lawful occupant or group of lawful occupants" when referring to a claim of harassment. The sub-section provides in part that:

> "Should the department fail to issue a notice of violation upon the request of a lawful occupant or group of lawful occupants within thirty days of the date of such request, or if there is a notice of violation outstanding respecting the premises in which the lawful occupant or group of lawful occupants resides, or, if there is a claim of harassment pursuant to subdivision d of section 27-2005 of this chapter, the lawful occupant or group of lawful occupants, may individually or jointly apply to the housing part for an order direct the owner and the department to appear before the court." (*See*, HMC § 27-2115(h)(1)).

The foregoing subsection concerns recourse for lawful occupants or a group of lawful occupants in several circumstances, one of which is if there is a claim of harassment. Specific reference to "lawful occupant or group of lawful occupants" in the context of standing to

bring a claim of harassment is noted, as is the omission of any reference to HPD in this context. Respondents looks to HMC § 27-2115(h)(1) for the premise that only a lawful occupant or group of lawful occupants have a private right of action based on a claim of harassment because HPD is not referenced in the subsection.

For HPD, because HMC § 27-2115(h)(1) specifically concerns recourse for lawful occupants or a group of lawful occupants the omission of any reference to HPD in that subsection does not mean that HPD's code enforcement authority is in some way restricted. HPD also notes that later in that same section, in setting out the remedies available for tenant harassment, HMC § 27-2115(m)(2) uses the term "petitioner" rather than "tenant." (*See*, HMC § 27-2115(m)(2) [" where a petitioner establishes there was a previous finding of a violation of [*4]subdivision d of section 27-2005 against such owner "]). HPD argues the foregoing reference to "petitioner" (as opposed to the more confining term "tenant") is magnified when, later in the same section, the code reverts to using the term "tenant" in two instances.[FN1] First, the code provides that an owner can seek injunctive relief against frivolous proceedings commenced by tenants (something which cannot be done against HPD). (*See*, HMC § 27-2115(m)(3) ["An owner may seek an order by the court enjoining a tenant from initiating any further judicial proceedings against such owner pursuant to this section claiming harassment without prior leave of the court "]). Second, the code provides an owner can obtain attorneys' fees against a tenant for frivolous harassment claims (which again cannot be obtained against HPD). (*See*, HMC § 27-2115(m)(4) ["Where the court determines that a claim of harassment by a tenant against an owner is so lacking in merit as to be frivolous, the court may award attorneys fees to such owner in an amount to be determined by the court."]). Therefore, HPD argues that a distinction drawn between "petitioner" and "tenant" in this sub-section denotes that not all petitioners are tenants in the context of a harassment proceeding.

Standard of Review:

At this juncture, with dueling interpretations of the HMC presented to the court, the standard of review for statutory construction and the level of deference that a court affords an administrative agency comes to the forefront. "It is settled law that an agency's interpretation of the statutes it administers must be upheld absent demonstrated irrationality or unreasonableness." (*Seittelman v. Sabol*, 91 NY2d 618, 625 [1998] *citing*, *Howard v. Wyman*, 28 NY2d 434 [1971]). That deference is maintained "where the interpretation of a statute or

its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom " (*Kurcsics v. Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]). "Where, however, the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretative regulations are therefore to be accorded much less weight. And, of course, if the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight." (*Kurcsics v. Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980] *citing*, *Adams v. Government Employees Ins. Co.*, 52 AD2d 118 [1st Dep't 1976]). When the issue is pure legal interpretation of statutory terms, "the judiciary need not accord any deference to the agency's determination, and is free to ascertain the proper interpretation from the statutory language and legislative intent." (*In re Claim of Gruber*, 89 NY2d 225, 232-233 [1996]; see also, *Seittelman v. Sabol*, 91 NY2d 618, 625 [1998]).

For example, in *Matter of Smith v. Donovan*, HPD issued vacate orders to owners, lessees and occupants of a building which contained illegal apartments and illegal rooming units. Petitioners contacted HPD and requested relocation services pursuant to N.Y.C. Admin. Code § 26-301(1), however, HPD refused the request on the ground that occupancy was illegal. Rather than defer to HPD, the court determined that HPD's interpretation of N.Y.C. Admin. Code § 26-[*5]301(1) was contrary to the plain meaning of the statute. The court interpreted the statute to provide that a tenant in a building subject to a vacate order is entitled to relocation services provided by HPD regardless of whether the dwelling unit is lawful. (*See*, *Matter of Smith v. Donovan*, 61 AD3d 505 [1st Dep't 2009]).

In the case at bar, the issue presented is also one of legal interpretation of statutory terms as opposed to HPD's operational practices or special competence developed in its administration of the HMC. Therefore, deference to an agency charged with enforcing a statute is not required when the question presented is one of "pure legal interpretation of statutory terms." (*Toys "R" Us v. Silva*, 89 NY2d 411, 419 [1996] *citing*, *Teachers Ins. & Annuity Ass'n v. City of New York*, 82 NY2d 35 [1993]); *see also*, *New York Botanical Garden v. Board of Stds. & Appeals*, 91 NY2d 413 [1998]). As such, the court is free to ascertain the proper interpretation of the statute from the plain language of the statute, as amended, and will consider legislative intent and applicable case law.

New York City Tenant Protection Act
Local Law No. 7 (2008) of the City of New York:

The law in question which amended the HMC is known as the New York City Tenant Protection Act, Local Law No. 7 (2008) of the City of New York (L.L. 7/2008, eff. Mar. 13, 2008) (referred to herein as the "Tenant Protection Act").[FN2] The Tenant Protection Act amended the HMC to create a housing violation for harassment.

In particular, HMC § 27-2004 was amended to add a new paragraph 48 to define the term harassment as "any act or omission by or on behalf of an owner that 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 includes a list of possible acts and omissions (emphasis added). (*See*, HMC § 27-2004(a)(48)).

HMC § 27-2005 was amended to add a new subdivision concerning "Duties of owner," so that "the owner of a dwelling shall not harass *any tenants or persons lawfully entitled to occupancy of such dwelling* as set forth in paragraph 48 of subdivision a of section 27-2004 of this chapter (emphasis added)." (*See*, HMC § 27-2005(d)).

HMC § 27-2115(h), which concerns circumstances in which "*the tenant or any group of tenants*, may individually or jointly apply to the housing part for an order directing the owner and the department to appear before the court" was amended to add that the tenant or any group of tenants may do so " if there is a claim of harassment pursuant to subdivision d of section 27-2005 of this chapter (emphasis added)." (*See*, HMC § 27-2115(h)(1)).

New subdivisions were added to HMC § 27-2115(m) to provide for a class c immediately hazardous violation and an imposition of penalties for harassment. The Tenant Protection Act amendment originally provided that "Such court shall impose a civil penalty in an amount not less than one thousand dollars and not more than five thousand dollars for each dwelling unit in which *a tenant or any person lawfully entitled to occupancy of such unit* has been the subject of such violation, and such other relief as the court deems appropriate (emphasis added)." (*See*, HMC § 27-2115(m)). HPD points to the use of "petitioner" in the current reading of this section to support their argument that not all "petitioners" are "tenants" in the context of a harassment [*6]proceeding, however, the term "petitioner" is not in the original text of the Tenant Protection Act and was added in subsequent amendments which increased the minimum penalties. (*See*, L.L. 47/2014, eff. Dec. 29, 2014, *see also*, L.L. 165/2017, eff. Dec 28, 2017).

HMC § 27-2120 was amended to add a new subdivision b to read as follows:

"*Any tenant, or person or group of persons lawfully entitled to occupancy* may

> individually or jointly apply to the housing part of the civil court for an order restraining the owner of the property from engaging in harassment. Except for an order on consent, such order may be granted upon or subsequent to a determination that a violation of subdivision d of section 27-2005 of this chapter has occurred (emphasis added)." (See, HMC § 27-2120(b)).

The court notes that the language selected by the New York City Council in enacting the Tenant Protection Act repeatedly uses "tenant", "tenant or any group of tenants", "person", and "person or group of persons" to describe those impacted by the law. Indeed, the use of "Tenant Protection Act" to name the local law is telling in and of itself. The language that the legislature adopted has meaning and the court would be remiss not to note the repeated use of "tenant(s)" and "person(s)" throughout the text. "It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the legislature. As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof (internal quotations omitted)." (*Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 NY2d 577, 583 [1998]). As clearly noted above, the New York City Council specifically used language in the Tenant Protection Act which repeatedly references tenants, persons, and lawful occupants in nearly every amended section.

The Tenant Protection Act was challenged by various landowners and a landlord's organization in *Prometheus Realty Corp. v. City of New York*, but the complaint was dismissed when the Appellate Division held that the new law fell within the "jurisdiction of the Housing Part entitling it to enforce laws to establish and maintain housing standards." (*See, Prometheus Realty Corp. v. City of New York*, 80 AD3d 206, 211 [1st Dep't 2010]). In this seminal decision, the court not only upheld the Tenant Protection Act, but in doing so delved into the legislative history and the City Council's intent in passing the act. Those findings are particularly insightful and provide guidance to this court in interpreting whether harassment is a private cause of action. For example, when framing the appeal, the court provided:

> "This appeal considers plaintiffs' challenge to the enactment by the New York City Council of the New York City Tenant Protection Act, Local Law No. 7 (2008) of the City of New York (Local Law 7), the aim of which is to provide legal remedies for tenants experiencing harassment by landlords attempting to force them out." (*See*, *Id*. at 208).

Furthermore, when analyzing the legislative history, the court determined that:

> "The law, which became effective on March 13, 2008, amended portions of New

> York City Administrative Code, title 27, chapter 2, which contains the Housing Maintenance Code, to provide new and greater protections for tenants experiencing harassment by landlords attempting to force them to abandon their apartments (Council of City of NY Press Release No. 098-2007 [Oct. 17, 2007]) (*See*, *Id*. at 208).

The court then determined that "Section 27-2115 was amended to add a private right of action based on a claim of harassment (subd [h])." (See, Id. at 208).

Therefore, in *Prometheus Realty Corp. v. City of New York*, the Appellate Division determined that the aim of the Tenant Protection Act was to "provide legal remedies for tenants experiencing harassment", that the City Council's objective was "to provide new and greater protections for tenants experiencing harassment" and that "Section 27-2115 was amended to add a private right of action based on a claim of harassment." This holding clearly supports Respondents' position that a cause of action for harassment within the meaning of HMC § 27-2005(d) and HMC § 27-2004(a)(48) is a remedy that is only available to tenants and lawful occupants, not to HPD.

Other amendments to the HMC lend further support to the position that the Tenant Protection Act intended harassment to be a private right of action. Whereas the Tenant Protection Act made no mention of HPD as a petitioner in a harassment proceeding, other amendments specifically reference HPD's enforcement role in the context of tenant harassment. The Certificate of No Harassment ("CONH") program is a prime example. Owners must apply to HPD for a CONH under certain circumstances before receiving a permit from the Department of Buildings to perform material alterations or demolition work. The CONH application program requires that HPD investigate as to whether harassment has occurred and the if HPD determines that reasonable cause exists that harassment occurred, a case is brought at the New York City Office of Administrative Trials and Hearings ("OATH") for a finding of fact and recommendation as to whether harassment occurred.

The CONH program was already in existence when the Tenant Protection Act was enacted. For example, "Administrative Code § 27-2093, added by section 7 of Local Law No. 19 (1983) of the City of New York, specifically concerns tenant harassment, creating a procedure by which the Department of Housing Preservation and Development may consider whether the owner of a single room occupancy building is entitled to a certificate of no harassment." (*See, Prometheus Realty Corp. v. City of New York*, 80 AD3d 206, 212-213 [1st Dep't 2010]). The CONH program, which adopted the same definition of harassment as contained in subdivision 48 of section 27-2004 of the HMC, has expanded over the years, including the creation of a "pilot program list" expanding the list of impacted buildings and

zoning areas, and the creation of a "tenant harassment prevention task force" to carry out the program, which continues to be adjudicated before an OATH Administrative Law Judge. (*See*, HMC § 27-2093.1). Therefore, whereas the Tenant Protection Act created new and greater protections for tenants, persons, and lawful occupants, HPD's enforcement role in the context of harassment was already delineated in the CONH program. This lends further support to the position that the Tenant Protection Act was intended to create a private right of action for tenants because HPD already had its own CONH enforcement mechanism, which has subsequently expanded, and which adopted the same definition of harassment.

HPD argues that the catch-all provision of HMC § 27-2120(a) trumps all prior analysis. That section of the HMC provides in pertinent part that, "The department may institute an action in a court of competent jurisdiction for an order requiring the owner of property or other responsible person to abate or correct any violation of this code, or to comply with an order or notice of the department, or for such other relief as may be appropriate to secure continuing compliance with this code. An action for injunctive relief hereunder may be brought in addition to other sanctions and remedies for violations of the code, or may be joined with any action for such other sanctions and remedies except criminal prosecution." (*See*, HMC § 27-2120(a)). HPD argues their department already had sweeping authority to institute an action "to abate or correct any violation of this code" at the time the Tenant Protection Act was enacted, including [*7]harassment. Aside from the legislative analysis and case law previously discussed, a flaw in the catch-all argument is that there are circumstances in which a tenant can bring an HP proceeding when HPD cannot. For example, a tenant can bring an HP if no violation is found at the premises and can prosecute that case to trial, whereas HPD cannot under those circumstances. (*See*, HMC § 27-2115(h)(1)). This example is magnified when considering that the Tenant Protection Act amended that very section to add "or if there is a claim of harassment pursuant to subdivision d of section 27-2005 of this chapter."[FN3] Furthermore, in the context of harassment, HPD's ability to commence a proceeding to "abate or correct any violation of this code" is problematic as there is no "violation" for harassment until the court places one. This lends support to the argument that there are circumstances in which a lawful occupant or group of lawful occupants can commence an HP proceeding when HPD cannot, and that a private right of action for harassment does not run counter to HPD's role in enforcing the HMC.

Therefore, Respondents' motion to dismiss all HPD's causes of action sounding in harassment is granted as this court finds, based on legislative intent, statutory text, and appellate case law in *Prometheus Realty Corp. v. City of New York*, and considering the HMC

as a whole, including the CONH program, that the Tenant Protection Act created a private right of action based on a claim of harassment.

Leave for Discovery Denied:

Respondents sought leave to conduct discovery in all five (5) proceedings. However, Respondents must first obtain leave of court. (*See*, CPLR § 408). The Housing Maintenance Code further provides that "Leave of court, obtained by motion to the housing part thereof, shall be required for disclosure or for a bill of particulars " (*See*, HMC § 27-2116(a)). The Uniform Rules for the New York City Civil Court also states that "No disclosure or bill of particulars shall be allowed without an order of the court in an action or proceeding to obtain a civil penalty in the housing part." (*See*, 22 N.Y.C.R.R. § 208.43(l)).

To justify discovery the moving party must demonstrate "ample need" for a claim or defense and the request for discovery must be narrowly tailored. (*New York Univ. v. Farkas*, 121 Misc 2d 643, 647 [Civ. Ct., NY County 1983]; *Hughes v. Lenox Hill Hospital*, 226 AD2d 4 [1st Dept. 1996], *lv to appl den'd* 90 NY2d 829 [1997]). In *New York Univ. v. Farkas*, the Court provided a list of factors on whether "ample need" has been met, which include (1) whether the party seeking discovery has asserted facts sufficient to establish a cause of action or defense; (2) whether movant has demonstrated a need to determine information directly related to that cause of action or defense; (3) whether the information requested is carefully tailored and is likely to clarify the disputed facts; (4) whether granting disclosure would lead to prejudice; (5) whether the court can alleviate such prejudice; and (6) whether the court can structure discovery so that *[*8]pro se* tenants will not be adversely affected by the discovery request. (*New York Univ. v. Farkas*, 121 Misc 2d at 647;*see also, Georgetown Unsold Shares, LLC v. Ledet*, 130 AD3d [2nd Dep't 2015]).

Applying the foregoing factors, Respondents have failed to show ample need. As a preliminary matter, the Court takes judicial notice of HPD's violation records as *prima facie* evidence of proof of the conditions stated therein. (MDL § 328(3); *see also*, *Dept. of Hous. Preserv. & Dev. of the City of NY v. Knoll*, 120 Misc 2d 813 [App Term, 2nd Dep't 1983] [HPD's computer database records are *prima facie* evidence of any matter stated therein.]). Respondents contend that they have corrected the conditions that gave rise to this proceeding, and that some or all of the violations were duplicative and previously corrected. To overcome the presumptions contained in the HMC, Respondents will need "documentary evidence in the form of a certification of compliance or repair receipts or detailed testimony of repairs

being done so as to show when and what repairs were specifically corrected ." (*Dept. of Hous. Preserv. & Dev. of City of NY v. Deka Realty Corp., et. al.*, N.Y.L.J., June 16, 1992, page 36, col. 6 [App Term, 2nd and 11th Jud. Dists. 1992], citing *Dept. of Hous. Preserv. & Dev. of City of NY v. Knoll*, 120 Misc 2d 813 [App Term, 2nd Dep't 1983]). The balancing act between the statutory presumption and ensuing burden is justified "since the knowledge of the work, labor and services performed is within the purview of the owner, it is reasonable to place on him, the burden of properly establishing, through his testimony and proof, that the violations listed have been properly corrected." (*Dept. of Hous. Preserv. & Dev. of City of NY v. Deka Realty Corp., et. al.*, N.Y.L.J., June 16, 1992, page 36, col. 6 [App Term, 2nd and 11th Jud. Dists. 1992]). Therefore, the burden is on Respondents themselves to prove that the conditions were corrected at trial and Respondents are the best custodians of their own repair records.

The same logic applies concerning civil penalties and the failure to demonstrate ample need for discovery. At a civil penalties hearing, it is incumbent upon Respondents themselves to show why civil penalties should not be assessed or to demonstrate mitigating circumstances. (*See*, HMC § 27-2116). To do so, Respondents need to show that violations were corrected within the time specified and that certificates of compliance were duly filed. (*See*, HMC § 27-2116(b)(1)). Respondents could also seek to show that violations did not exist when the notices of violation were served or demonstrate certain delineated mitigating circumstances to the Court. (*See*, HMC § 27-2116(b)(2)). To demonstrate mitigating circumstances, it is incumbent "the owner shall show, by competent proof, pertinent financial data, and efforts made to obtain necessary materials, funds or labor or to gain access, or to obtain a permit or license and such other evidence as the court may require." (*See*, HMC § 27-2116(2)(iii)). Therefore, at a hearing for civil penalties, the Housing Maintenance Code puts the burden on Respondents to produce evidence in their own defense. As such, Respondents have failed to demonstrate "ample need" for disclosure. For the foregoing reasons stated, Respondents' motion for disclosure is denied. This finding is without prejudice to any trial subpoenas.

The Court has considered the remaining arguments and issues presented in Respondents' motion and finds them unavailing. Therefore, for the reasons stated, Respondents' motion is granted in part and denied in part. Having dismissed HPD's causes of action sounding in harassment, the balance of the five (5) proceedings are transferred to Part X for trial.

This constitutes the Decision/Order of this Court, which shall be uploaded to NYSCEF.

Dated: March 17, 2022
Brooklyn, New York

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Julie Poley JHC

Footnotes

Footnote 1: Although not dispositive, the court notes that HPD is referred to as "the department" throughout HMC § 27-2115 (as opposed to "petitioner") and that not only does sub-section (m) interchange the use of "petitioner" and "tenant," but that subsection also drops usage of "lawful occupant or group of lawful occupants" that was used in prior sections.

Footnote 2: The name selected for the law, which explicitly references tenants, favors Respondents' argument that the cause of action for harassment was intended to be a private right of action.

Footnote 3:"Should the department fail to issue a notice of violation upon the request of a lawful occupant or group of lawful occupants within thirty days of the date of such request, or if there is a notice of violation outstanding respecting the premises in which the lawful occupant or group of lawful occupants resides, or, if there is a claim of harassment pursuant to subdivision d of section 27-2005 of this chapter, the lawful occupant or group of lawful occupants, may individually or jointly apply to the housing part for an order direct the owner and the department to appear before the court." (*See*, HMC § 27-2115(h)(1)).

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