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

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[*1]

Department of Hous. Preserv. & Dev. of the City of N.Y. v Rosenfeld
2022 NY Slip Op 50480(U)
Decided on June 10, 2022
Civil Court Of The City Of New York, Kings County
Stoller, 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This opinion is uncorrected and will not be published in the printed Official Reports.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 June 10, 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

**J Rosenfeld, JUDA ROSENFELD, and EAST 95 REALTY LLC,
Respondent.**

Index No. 300953/2021

For Petitioner: Michael Paul Gdanski

For Respondent: Scott Gross

Jack Stoller, J.

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

Pages numbered

Notice of Motion and Supplemental Affirmation Annexed 1, 2

Affirmation and Affidavit In Opposition 3, 4

Affirmation In Reply 5

Upon the foregoing papers, the Decision and Order on this motion are as follows:

The Department of Housing Preservation and Development of the City of New York ("HPD"), the petitioner in this proceeding, commenced this proceeding against J Rosenfeld, Juda Rosenfeld, and East 95th Realty LLC, the respondents in this proceeding ("Respondents"), seeking an order to correct and civil penalties with regard to violations of the New York City Housing Maintenance Code at 1008 Winthrop Street, Brooklyn, New York ("the subject premises"). The parties signed off on an order directing that Respondents correct violations at the subject premises ("the Consent Order"). HPD now moves for an order awarding it civil penalties against Respondents and to join another party as a respondent to this proceeding.

On December 2, 2021, both parties signed off on the Consent Order that directed Respondents to, *inter alia*, provide hot water to the subject premises. On default, the Consent Order provided that HPD "may seek additional civil penalties ." HPD alleges that Respondent has defaulted in the order, evidenced by HPD's placement of three violations. One of the violations, placed on January 12, 2022, is for an inadequate supply of cold water.

The Court construes a consent order to correct in the same way as a binding stipulation [*2] that a party enters into instead of taking the risk of an adverse outcome at trial. *HPD v. Maccarone*, N.Y.L.J., May 25, 2003 at 19:3 (App. Term 2nd and 11th Depts.). As a stipulation is a contract, [Matter of Banos v. Rhea, 25 NY3d 266, 276 \(2015\)](#), the Court construes the consent order according to the canons of contractual construction. "*Inclusio unius est exclusio alterius*," a canon of contractual construction, *Two Guys from Harrison-N.Y. v. S.F.R. Realty Assocs.*, 63 NY2d 396, 404 (1984), provides that a specific provision that only applies to a particular circumstance implies the intended exclusion of that provision from other circumstances. [2626 Bway LLC v. Broadway Metro Assocs., LP, 85 AD3d 456, 457 \(1st Dept. 2011\)](#). As the Consent Order provides for additional penalties for hot water violations and not cold water violations, HPD does not state a cause for additional penalties for cold water violations. [FN1] Accordingly, the Court will deny so much of HPD's motion as seeks additional penalties for the cold water violation.

On January 12, 2022, HPD placed a "C" violation for inadequate hot water in apartment 2C of the subject premises and on February 7, 2022, HPD placed a "C" violation for inadequate hot water in apartment B8 of the subject premises ("the Hot Water Violations"). HPD's placement of violations gives rise to a presumption that the condition existed. MDL §328(3). As a prima facie matter, then, HPD states cause to impose additional civil penalties

on Respondents for the Hot Water Violations, in particular enhanced penalties that apply to hot-water violations recurring in two consecutive calendar years pursuant to N.Y.C. Admin. Code §27-2115(k)(1)(i) ("Enhanced Penalties").

In opposition, Respondents showed a form that HPD generated that informed Respondents to correct the violation from January 12, 2022 on or before January 20, 2022. Respondents' property manager ("the Property Manager") averred in opposition that there was a water leak on January 12, 2022 that forced him to interrupt the boiler and that Respondents corrected the violation that day. Respondents supported this averment with a contemporaneous invoice from a contractor. The Property Manager averred that he waited six days to certify to HPD that Respondents corrected the violation because he wanted to make sure that the underlying leak did not recur. HPD has since removed the violation from its database.

Respondents argue, in essence, that HPD's form with a date of January 20, 2022 estops HPD from seeking civil penalties for any condition that Respondents corrected before January 20, 2022. However, notices of violation, while requiring immediate correction of conditions, can still give owners ten days to certify, *Dep't of Hous., Pres. & Dev. v. France*, 63 Misc 3d 792, 794 (Civ. Ct. Bronx Co. 2019), which satisfies the notice as required by the hot water provisions of the New York City Housing Maintenance Code. *Dep't of Hous., Pres. & Dev. v. [*3]France*, 73 Misc 3d 132(A)(App. Term 1st Dept. 2021). [\[FN2\]](#)

Moreover, a party claiming estoppel bears the burden of proving, *inter alia*, that they changed their position to their injury in reliance on the representation of another. [Overbay, LLC v. Berkman, Henoch, Peterson, Peddy & Fenchel, P.C.](#), 185 AD3d 707, 709-10 (2nd Dept. 2020), [Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt., L.P.](#), 22 AD3d 204, 211 (1st Dept. 2005). Respondents represent that they corrected the violation the same day that the problem occurred. To the extent that Respondents may argue that they waited to certify to HPD that they corrected the violation in reliance on the notice from HPD, that wait would not adversely affect their defense to civil penalties, as proof of prompt and diligent efforts to correct the conditions is a defense to Enhanced Penalties, N.Y.C. Admin. Code §27-2115(k)(3)(v), and an owner only incurs liability for penalties until "the date the violation is corrected ." N.Y.C. Admin. Code §27-2115(k)(1)(i). Respondents therefore cannot show that they changed their position to their detriment in reliance on HPD's form.

Furthermore, the kind of equitable estoppel that Respondents argue applies is not a defense to civil penalties as provided in the statute, N.Y.C. Admin. Code §27-2115(k)(3) and,

more broadly, estoppel is not available as a remedy to prevent a governmental agency from discharging its duties, [W. Midtown Mgmt. Grp., Inc. v. State of NY, Dep't of Health, Office of the Medicaid Inspector Gen., 31 NY3d 533](#), 541-42 (2018), as doing so could easily result in large-scale public fraud and may violate the doctrine of separation of powers. *E.F.S. Ventures Corp. v. Foster*, 71 NY2d 359, 370 (1988). With regard to the enforcement of the New York City Housing Maintenance Code in particular, said enforcement is a matter of public policy and equitable defenses do not lie against such public policy objectives. *Turco v. Novita LLC*, 2021, NY Slip Op. 31257(U)(Civ. Ct. NY Co.), [Allen v. 219 24 St LLC, 67 Misc 3d 1212\(A\)](#) (Civ. Ct. NY Co. 2020).

With regard to the violation that was placed on February 7, 2022, the Property Manager averred that his employee advised him of a broken hot water line, that the employee repaired it, that the Property Manager inspected the work on February 9, 2022, that the Property Manager consulted with the affected tenants, and that he certified the violation as corrected on February 10, 2022. Respondents supported this averment by an invoice dated February 8, 2022. HPD has since removed that violation from the database as well.

As noted above, owners may defend against Enhanced Penalties upon proof of prompt and diligent efforts to correct the conditions that gave rise to an initial violation and that such conditions were corrected. N.Y.C. Admin. Code §27-2115(k)(3)(v). To the extent that Respondents assert that they corrected the conditions with the promptness that they did, Respondents state a defense to the kind of Enhanced Penalties that HPD seeks.

HPD argues that the undisputed lack of hot water, and nothing more, compels an award of civil penalties as a bargained-for consequence of the Consent Order without an opportunity to interpose a defense. However, the Consent Order did not state that Respondents "shall" be liable for additional civil penalties, only that HPD "may" "seek" an award of civil penalties upon a default of the directive in the Consent Order to provide hot water. Accordingly, the Consent Order does not preclude the interposition of the kind of defenses to civil penalties provided by [*4]the New York City Housing Maintenance Code.

Based upon Respondents' opposition, the only colorable defense that Respondents have is the extent of their prompt and diligent efforts to correct the lack of hot water. *Id.* The Court notes, however, that this defense only applies to the portion of the civil penalties sought that applies to Enhanced Penalties, not the standard-issue rate of civil penalties as provided for in N.Y.C. Admin. Code §27-2115(k)(1)(i), although to the extent that N.Y.C. Admin. Code §27-2115(k)(1)(i) imposes the penalty until the date that Respondents corrected the violation,

proof of that fact may ultimately be an issue for a hearing.

HPD argues that Respondents have not submitted proof in admissible form sufficient to warrant a hearing. However, the Property Manager's averments in his affidavit were made with personal knowledge. HPD does not dispute that it has removed to the two violations for which it seeks Enhanced Penalties which is at least probative of the nature of the defenses Respondents have. Furthermore, HPD did not put Respondents on notice that they would have to present opposition in admissible form, as HPD did not move for summary judgment. [*Nonnon v. City of New York*, 9 NY3d 825, 827 \(2007\)](#), [*Sokol v. Leader*, 74 AD3d 1180, 1183 \(2nd Dept. 2010\)](#). As a general matter the Court can only resolve factual questions by hearings. *See, e.g.*, [*342 E. 67 Realty LLC v. Jacobs*, 106 AD3d 610, 611 \(1st Dept. 2013\)](#). The record adduced herein demonstrates that a hearing is appropriate.

HPD also moves to join another individual as a respondent to this proceeding, supporting its motion with an affidavit of that individual showing that he exercises a level of control over the subject premises sufficient to fulfill the liberal definition of an "owner" according to the New York City Housing Maintenance Code. N.Y.C. Admin. Code §27-2004(a)(45). Respondents do not dispute the factual allegations supporting HPD's motion to join. Rather, Respondents quarrel with the timing of the motion at this posture of the proceeding and point out that no proposed pleading was annexed to the motion.

The CPLR governs supplemental pleadings in the Civil Court of the City of New York. New York City Civil Court Act 909(b). CPLR §1003 addresses joinder of parties. CPLR §305 provides for service of supplemental pleadings *after* the order pursuant to CPLR §1003 granting joinder, compelling the conclusion that annexation of such pleadings is not a requirement of a motion to join. Given that New York City Civil Court Act §110(d) provides for liberal joinder provisions, Respondents' opposition to Petitioner's motion to join is not persuasive.

Accordingly, it is

ORDERED that the Court denies so much of the motion of HPD as seeks civil penalties with regard to the violation for cold water, and it is further

ORDERED that HPD has proven a default on the Consent Order as a prima facie matter with regard to the Hot Water Violations, and it is further

ORDERED that the Court grants the motion of HPD for civil penalties to the extent of

calendaring the matter for a hearing on the fact question of the date that Respondents corrected the hot water violations, and on a defense to Enhanced Penalties pursuant to N.Y.C. Admin. Code §27-2115(k)(3)(v), and it is further

ORDERED that the Court grants the motion of HPD to join Isaac Rosenfeld as a respondent to this proceeding, and it is further

ORDERED that the Court directs HPD to serve Isaac Rosenfeld and Respondents with a supplemental petition on or before June 21, 2022, and it is further

ORDERED that the Court refers the hearing on this motion to the trial expediter in Kings County for referral to a trial part there.

This constitutes the decision and order of this Court.

Dated: June 10, 2022
Brooklyn, New York
HON. JACK STOLLER
J.H.C.

Footnotes

Footnote 1: While HPD's counsel asserts that there was no water at all, that is not what the violation says. The affirmation of an attorney has no probative value toward a fact proposition. [*Thelen LLP v. Omni Contr. Co., Inc.*, 79 AD3d 605](#), 606 (1st Dept. 2010), *leave to appeal denied*, 17 NY3d 718 (2011), *Zuckerman v. New York*, 49 NY2d 557, 563 (1980), [*Monaghan v. Cole*, 171 AD3d 558](#), 559 (1st Dept. 2019), [*Gihon, LLC v. 501 Second St., LLC*, 103 AD3d 840](#) (2nd Dept. 2013). To the extent that Respondents did not provide water at all, the violation for not providing hot water on the day in question is addressed below.

Footnote 2: The Appellate Term decision cited above reversed the lower Court decision cited above. The Court cites the lower Court decision for the content of the notice of violation at issue.

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