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### Fisher Knickerbocker LLC v. Alleyne

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

-----X  
FISHER KNICKERBOCKER LLC,

Petitioner,

Index No. 300462/2020

-against-

NIGELLE ALLEYNE and NKOSI ALLEYNE,

DECISION/ORDER

Respondent.

-----X  
Present: Hon. Jack Stoller  
Judge, Housing Court

Fisher Knickerbocker LLC, the petitioner in this proceeding (“Petitioner”), commenced this summary proceeding against Nigelle Alleyne (“Respondent”), a respondent in this proceeding, and Nkosi Alleyne (“Co-Respondent”), another respondent in this proceeding (collectively “Respondents”), seeking a money judgment and possession of 1 Tennis Court, Apt. 2D, Brooklyn, New York (“the subject premises”) on the allegation of nonpayment of rent. Respondent interposed an answer, originally on September 14, 2020 and later amended, with defenses and counterclaims of rent overcharge, repair and deduct, and breach of the warranty of habitability. The Court held a trial of this matter on December 13, 2021, December 29, 2021, February 17, 2022, and June 23, 2022.

**Petitioner’s case**

The parties stipulated that Petitioner is a proper party to commence this proceeding; that there is a lease between the parties commencing August 2021 with a monthly rent of \$1,579.15; that the subject premises is subject to the Rent Stabilization Law; that Petitioner is in compliance with the registration requirements of 9 N.Y.C.R.R. §2528.3 and MDL §325; and that Respondent is a beneficiary of a federal subsidy pursuant to 42 U.S.C. §1437f known colloquially as “Section

8,” administered by the New York City Housing Authority (“NYCHA”) according to which Respondent is to pay a share of the rent that is calculated based on her income (“Respondent’s share”). 42 U.S.C. §1437a(a)(1)(A), 24 C.F.R. §5.628(a).

The parties stipulated to the admissibility of a rent ledger for Respondent. The ledger showed a credit at the beginning of August 2019 in the amount of \$315.53 and did not credit any payments from Respondent’s share after that date. Respondent’s share from August through November of 2019 was \$1,194, from December of 2019 through July of 2020 was \$1,203, from August of 2020 through June of 2021 was \$1,159, and July of 2021 through December of 2021 was \$1,349. The total arrears through December 31, 2021, therefore, are \$34,927.47.

The Court file demonstrates that Petitioner demanded payment of rent pursuant to RPAPL §711(2) prior to the commencement of this proceeding.

### **Respondent’s case**

The parties stipulated that there is no record of Respondent making calls to the emergency line.

Respondent testified that she has lived in the subject premises since August of 2008; that Co-Respondent, her son, has lived with her; that her mother comes and goes; that when you come in you go straight into the living room; that there is a little walkway and a dining area; that there is a kitchen; that there is a closet; that there is a hall and two bedrooms; that there are two bathrooms; that she has not paid rent because Petitioner has not done repairs; that she stopped paying rent in August of 2019; that NYCHA is supposed to do an annual inspection of the subject premises; and that NYCHA has inspected more than once a year because she called them.

Respondent submitted into evidence records of NYCHA inspections for housing quality (“NYCHA records”).<sup>1</sup>

NYCHA records also showed that Respondent’s share of the rent was \$830.00 from January through August of 2015; \$895 from September of 2015 through June of 2016; \$895.30 from July through October of 2016; \$1,336 in November of 2016; \$1,171 from December of 2016 through August of 2017; \$1,208 from September of 2017 through June of 2018; \$1,293 from July through December of 2018; and \$1,194 from January through July of 2019.

### **The “Pink Bathroom”**

The subject premises has two bathrooms. Respondent referred to one as “the pink bathroom” and another as “the white bathroom” based on the color of the walls and, for purposes of identifying which bathroom the Court refers to, the Court adopts Respondent’s nomenclature. NYCHA records show mold and mildew in the ceiling of the pink bathroom as per an inspection dated July 1, 2015; a leak in bathroom tub/shower faucet unit in the pink bathroom as per an inspection dated April 13, 2016; defective wall tiles in bathroom as per an inspection dated April 24, 2018; and a chipped wall and leak damage as per an inspection dated August 29, 2019. NYCHA records also show letters that Respondent signed in August of 2015 and on April 14, 2016, and May 24, 2018 certifying that repairs were complete. Respondent testified that she signed those documents because the super told her to so they could be sent to NYCHA.

Respondent testified that there had been mold and mildew from the top of the windowsill all the way down and on the sides of the walls; that she first noticed that condition at the beginning of the year; that she kept wiping it but it kept coming back; that she told the super in

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<sup>1</sup> In order for a dwelling to qualify for a Section 8 subsidy, the housing must be up to a particular level of quality standards. 24 C.F.R. §982.401(a)(3).

person about this condition; that this condition recurred; that she had allergies so she was affected by the condition; that there was an intermittent leak through the bathroom ceiling tiles, where the shower is, in 2015; that she called Petitioner's emergency number when this happened; that usually the super gets in touch after she makes a call to the emergency number; that the super came to look at this; that all the super did was paint over the damage; that the paint would change color; that the bathroom ceiling fell in; that she heard it late at night; that she called Petitioner's emergency number; that the super did not come until the morning; that the super looked at it and said he was going to check upstairs; that she could not use the bathroom at all; and that she got allergic reactions to the dust that resulted.

Respondent submitted into evidence a photograph from May or June of 2016 depicting a bathroom ceiling with a large hole and missing plaster and showing debris in a toilet. Respondent testified that the ceiling looked like that for a month because the super had to wait for it to dry; that in 2017 there was a leak on the outside and inside of the shower; that the shower has tiles from the floor to the ceiling; that there is a ledge on the side of the shower; that there are tiles on the outside, meaning the wall and around the shower; that she told the super about it and called the emergency number; that the leak was intermittent; that Petitioner sent someone in 2018 to fix the shower; that she could not use the shower when this was going on because she did not know where the water was coming from; that she does not have a shower in her other bathroom, so she had to use the tub then; that on New Year's Day 2017 early in the morning was when she heard water dripping; that there was a big water bubble and water was pouring into her bathroom sink; that she called the emergency number; that the person who answered the call said that they would let the company know; that a super from another building came to look at it; that it was pouring first and then it started to drip and then it stopped

altogether; that a small bucket's worth of water came down; that it came down right over the sink; that she could not use the bathroom at all; that she had to throw out the medications in the medicine cabinet because they got soaked; that she had to replace those items; that the water that came through the medicine cabinet was kind of brown; that someone came and looked at it; that the super came back about two or three weeks later and fixed it on top; that she does not know if they repaired it; that the super scraped it, put on plaster, and then painted over it; that she is unaware of anything done to address the source of the leak; that she had to go to the other bathroom to bathe; and that her affected bathroom was the only one with a shower.

Respondent submitted into evidence a photograph taken in May of 2018 of the pink bathroom, showing tiles in the ceiling looking displaced.

Respondent testified that she experienced a leak from the shower; that she contacted the super; that the super came and looked and said he would check upstairs; that the leaking intermittently recurred after that every day at different times of the day; that Petitioner repaired some of the tiles when she commenced a proceeding in Housing Court pursuant to N.Y.C. Admin. Code §27-2115(h) against Petitioner ("the HP proceeding") in October of 2019; that she still gets water coming down; and that when this was going on she had to use the bath instead of the shower.

Respondent submitted into evidence a photograph dated July 1, 2018 depicting a bubble in a ceiling. Respondent testified that the bathroom floor was wet at this time and then she saw the bubble; that she called the emergency number; that some white stuff came out after the bubble burst; that the super repaired it and he said to wait for it to dry; that she used the other bathroom instead of this one because she could not use the sink; that this problem was repaired

two months later with plastering and painting; that the super inspected; and that the leak recurred two days later and that she could not use the shower at this time.

Respondent submitted into evidence photographs which she testified may have been taken in 2018, depicting a ceiling with some bumps in it and some discoloration around wall tiles. Respondent testified that in spring of 2018 she called the super or the emergency number; that the super painted and plastered; that the super had to change the color; that the super had to wait for it to dry before painting took two months; and that there was water in the medicine cabinet.

Respondent submitted into evidence a photograph of a floor of a shower that depicted discoloration in the floor tiles. Respondent testified that she used the other bathroom in the subject premises; that she notified the super of this problem; that this went on for a year; that the super grouted the ceiling of the shower which fixed the problem; that she saw moisture on the walls around October 5, 2019; that the super checked it out the next day; and that when the Petitioner did work after the commencement of an HP proceeding the work involved breaking the tiles.

NYCHA records dated July 28, 2021 show that an inspection revealed cracked and damaged wall tiles and a defective drain stopper.

Jeffery Mayers (“Respondent’s Friend”) testified that he lives elsewhere in Brooklyn; that he knows Respondent from church; that he has been a super for over six years; that he works for reliant; that he is responsible for 172 units; that Respondent told him about problems in the subject premises; that contractors removed mold and painted the bathrooms; that the work was okay at the moment but that no one had found the leak; that he could hear the water dripping behind the wall coming from upstairs; and that he saw and smelled the mold in the bathrooms.

Respondent's Friend testified on cross-examination that he has a certification for mold; that he is not a licensed mold assessor or mold remediator; that he remediates mold in the building in which he is a super; and that he was in the subject premises two times.

The measure of damages for breach of the warranty of habitability is the difference between the rent reserved under the lease and the value of the premises during the period of the breach. Park West Management Corp. v. Mitchell, 47 N.Y.2d 316, 329, *cert. denied*, 444 U.S. 992 (1979), Elkman v. Southgate Owners Corp., 233 A.D.2d 104, 105 (1st Dept. 1996).

Respondent bears the burden of proving, *inter alia*, the dates of the breach. Matter of Moskowitz v. Jorden, 27 A.D.3d 305, 306 (1st Dept.), *appeal dismissed*, 7 N.Y.3d 783 (2006), 34-15 Parsons Blvd. LLC v. Zhao and Wang, 2022 N.Y. Slip Op. 50283(U)(App. Term 2<sup>nd</sup> Dept.).

Respondent's testimony was not always specific about what months leaks recurred in the pink bathroom that caused various manifestations of damage, but the preponderance of the evidence shows that the pink bathroom sustained such damage for a month in July of 2015, for a month in June of 2016, for a month in January 2017, for two months in the spring of 2018, for two months in July and August of 2018 and two months in September of October 2019. While Respondent had another bathroom in the subject premises, the deprivation of her ability to shower and use the pink bathroom in general diminished the habitability of the subject premises by 18 percent. At a rate of \$830.00 for July of 2015, \$895 in June of 2016, \$1,171 in January of 2017, \$1,208 for two months in the spring of 2018, \$1,293 in July and August of 2018, and \$1194 in September and October of 2019, Respondent's aggregate rent liability for the times when she could not use the pink bathroom was \$8,786.00. Eighteen percent of \$8,786.00 is \$1,581.48.



## **The “white bathroom”**

NYCHA records show a leak in bathroom tub/shower faucet unit according to an inspection that was done on April 13, 2016; leak damage, to wit, bubbling in a wall, according to an inspection that was done on October 9, 2018; a defective wall and window, chipping, leak damage, caulking needed by a tub, mildew and mold, and an overflow in a missing cover missing according to an inspection that was done on August 29, 2019; and a broken drain stopper and tub that was not working according to an inspection that was done on July 28, 2021.

NYCHA records also show a letter that Respondent signed on April 14, 2016 certifying that repairs were complete.

Respondent testified that there was a leak in the white bathroom in 2016, causing water bubbling and a buckling of the wall; that she was not able to wipe the water away; that she noticed this problem when she had to use the white bathroom more because of her inability to use the pink bathroom; that she told the super right away; that the super said that it had to dry before the super could repair; that when it dried, the super scraped and plastered the wall; that in 2016 water leaked over the tub; that she told the super about that and called the emergency number; that she saw water bubbles that started to come over the wall and then over the tub; that Petitioner had to wait for a month for it to dry; that they then came back to repair, meaning that they scraped, plastered, and painted; that she could not use the bathtub at all because of the caulking; that in 2017 there was a leak over the sink; that she called the emergency number because that happened in the night; that Petitioner waited for it to dry and sent someone to paint and plaster, which took one or two months; that she could not use the sink or the tub in that bathroom during that time; that sometime around the spring or the summer of 2017 she saw a leak in the bathroom, like bubbles; that she always called the emergency number when she

witnessed this leak; that the super came up; that the super said he would have to let it dry and then he would plaster and paint it over, which is what happened; that it was a month or two before someone came to remedy this problem; that the water dripped for over an hour, although she is not sure because she did not notice it at first; that she could not use the sink or the toilet at all because she did not know what kind of water was coming down so she had to use the other bathroom; and that she had to keep the bathroom door closed because of the smell.

Respondent submitted into evidence a photograph depicting a bubble in a ceiling over the toilet. Respondent testified that this bubble burst and left water all over the floor and the toilet; that she called the emergency number; that she could not use the bathroom when this happened; that she could not use the toilet and the sink because the water and whatever was in it splashed over the sink; that the super then scraped and plaster and painted; and that the super said it could have been from upstairs. Respondent submitted into evidence a photograph of ceiling damage. Respondent testified that when she called the super, the super said he would check upstairs; that it had to dry; and that the ceiling fell in at that time. Respondent submitted into evidence photographs dated from January of 2018 depicting something covering a hole in a ceiling, an opening in a ceiling with exposed wood joists.

Respondent testified that she could not see into the upstairs apartment from the hole; that the hole was as big as a 19-inch television set; that everything fell on the sink; that she could not use the bathroom because plaster was all over everything; that she usually washes her mouth in that sink; that a plastic bag came out of the ceiling; that the super repaired this three months later; and that there was a smell that gave her an allergic reaction. Respondent submitted into evidence a photograph dated September 12, 2018 depicting a bathroom ceiling that had been repaired. Respondent testified that the wall then started to peel; that water came down again; that

Petitioner did not repair the bubbling in the photo; that she has bubbles in her wall now; that she was not using the bathroom; that Petitioner had it scraped and plastered and painted again; that the problem recurred on December 24, 2021; that she heard water dripping on the floor; that she called the super; and that the super came up. Respondent submitted photographs into evidence dated December 24, 2021 showing leak damage on the walls.

Respondent testified that water was all over; that the floor was wet; that water came into the hallway; that no repairs have been done; that the subject premises still looks like that; that water was not coming down on the day of her testimony; that she is not using the toilet because water could come down on her; and that the bubble in the photograph burst.

Respondent submitted into evidence photographs dated from Christmas of 2020 depicting leak damage, water bubbling, and a bucket where she collected water. Respondent testified that a bucket that she had out already was filling up fast; that she experienced a leak around Christmas of 2020; that she let the super know and called the emergency number; that everybody had to use the pink bathroom; that in March of 2021 she noticed water on the walls again; and that she let the super know that it dried out. Respondent submitted into evidence a photograph dated from January of 2022, depicting a spot on the ceiling, leak damage, water bubbling, a trail of water coming down from the bubble in the ceiling January of 2022. Respondent testified that she complained to the super; that two weeks before her testimony they scraped, painted, and broke a wall; and that a week elapsed between notice and repair.

Respondent's Friend testified that tiles in the tub were damaged; that the damage in the bathroom was six feet by seven feet; and that there was a four foot by three feet area of mold on both directions.

Respondent proved that the conditions in the white bathroom were present for one month in 2016, two months in 2017, January through September of 2018, and January, March, and December of 2021. Respondent's aggregate rent liability for all of these months was \$18,231. The conditions in the white bathroom diminished the habitability of the subject premises by 18 percent. Eighteen percent of \$18,231 is \$3,281.58.

### **Mice**

Respondent testified that she had a lot of mice in the kitchen and the living room; that she put down traps; that mice were on a dining room table; that she told Petitioner about the mice; that an exterminator came but whatever they did did not work because she still saw mice; that she let the super know; that the super said the exterminator would come; that the exterminator sprayed and that was it; that the exterminator put traps down; that nothing else was done; that the spraying did not resolve the problem; that she could not leave food exposed in the subject premises; that she sees at least four to five mice per month on traps; that in 2015 she caught between ten and eleven mice per month; that she told the super about it every time she saw the super; that she believes that she saw an exterminator more than once; that she bought traps; that she has to take garbage out every day; that mice have run up onto the stove; and that she has to disinfect the stove.

By a petition verified on October 1, 2019, Respondent commenced a proceeding pursuant to N.Y.C. Admin. Code §27-2115(h), captioned at Alleyne v. Fisher Associates, Index #6313/2019 (Civ. Ct. Kings Co.) ("the HP proceeding"), which did not include an allegation regarding mice. The parties, both represented by counsel, settled a holdover proceeding captioned at Fisher Knickerbocker LLC v. Alleyne, Index #83358/2019 (Civ. Ct. Kings Co.) ("the holdover proceeding") by a stipulation dated January 28, 2020 ("the January 2020

Stipulation”) which did not mention any allegation regarding mice. By a stipulation in the HPD proceeding dated March 9, 2020, the parties references new violations for mice and roaches that had not previously been a part of the HP proceeding.

Respondent testified on cross-examination that she did not restore the HP proceeding because of the pandemic and that she has not asked for extermination since October of 2021 because the last time it caused more problems and she could not breathe because of allergies.

While Respondent’s testimony about a mouse infestation was unrebutted, the omission of the condition from the petition in the HP proceeding and the January 2020 Stipulation effectively deprived Petitioner of notice of that condition, at least until the March 2020 Stipulation.

Moreover, while Respondent testified that she had the problem since 2015, she did not testify as to which month in 2015. As Respondent bears the burden of proving dates and notice, the only month in 2015 for which the Court will award a rent abatement is December. Respondent’s aggregate rent liability from December of 2015 through September of 2019 and then from March of 2020 through October of 2021 is \$76,465.20. A mouse infestation of the kind that Respondent described diminished the habitability of the subject premises by 20%. Compare 501 N.Y. LLC v. Anekwe, 14 Misc.3d 129(A)(App. Term 2<sup>nd</sup> Dept. 2006)(awarding a 40% abatement for vermin infestation), Hillside Place LLC v Lewis, 29 Misc.3d 139(A)(App. Term 2<sup>nd</sup> Dept. 2010) (affirming a 15% abatement for vermin infestation). Twenty percent of \$76,465.20 is \$15,293.04.

### **Kitchen**

Respondent testified that she had a major flood in the kitchen in May or June of 2015; that the floor was soaked and everything inside the cabinets was damaged; that she told the super about this and she called Petitioner, i.e., the main office number, where she spoke to someone

who said that Petitioner was not responsible for the flood; that the super scraped, plastered, and painted the kitchen ceiling maybe two months later because the super said that the super had to let it dry; that she does not know if they did anything about the source of the leak; that she had to put things into the living room and dining room rather than in the kitchen; that she usually cooks and bakes and cleans in the kitchen; and that she was not able to bake anything and she was barely able to cook in the kitchen.

NYCHA records show a ceiling that was buckling or bulging as per an inspection dated April 11, 2017 and a letter signed by Respondent on April 24, 2017 saying that Petitioner repaired the condition. Respondent testified that Petitioner did not in fact remedy the condition; that she had noticed water bubbling and coming down in the kitchen at that time; that she saw the bubble burst and observed about a quart of water come out; that she called the super to tell him what happened; that the super observed it and said he would have to wait for it to dry; that it took one to two months to repair the damage; that she is unaware of anything done to address the source of the leak; that she could not use the kitchen during that time; that she could not store dishes in the cabinet, but had to store them in the dining table; that she had to use the dining table to prepare food because she could not use the countertop; and that the leak continued, as she started to see paint coming off under the walls.

Respondent submitted into evidence a photograph taken in summer of 2018 or summer of 2019. Respondent testified that she called the super about this problem in May of 2019; that she first observed leaking; that the ceiling opened up five more inches, creating a hole in the ceiling after the photograph was taken; that the plaster started to fall down; that again the super came and said it had to dry; that the super came to fix the problem a month later; that the super scraped and plastered and painted; that she could not keep anything on countertops when this was going

on; that she dried dishes on her dining table; that the leak has continued; that she just washes dishes in the kitchen; that the stuff that is leaking is not safe; that she keeps her kitchen things in bins in the kitchen and living room; that she is unable to use any of the cabinets in the kitchen except for cleaning materials under the sink; that a prior leak ruined what she had in the cabinets; and that she cooks about three to four times a week. NYCHA records show that the kitchen wall sustained leak damage as per an inspection dated August 29, 2019. Respondent submitted into evidence a photograph taken in the summer of 2019 of leak damage in kitchen wall summer of 2019. Respondent testified that she told the super; that the super checked for dampness; that the super repaired the wall in October of 2019; and that this condition affected her use of the counters just as before.

Respondent's Friend testified that contractors removed mold and painted the kitchen; that he saw and smelled the mold in the kitchen; and that there was mold in the kitchen above the cabinet for an area of two feet by one foot.

Respondent proved that there were leak conditions in the kitchen of the subject premises in June and July of 2015, April of 2017, and May of 2019 to October of 2019. Respondent's aggregate rent liability for these months is \$9,995.00. The leak conditions diminished the habitability of the subject premises by eighteen percent. Eighteen percent of \$9,995.00 is \$1,799.10.

Respondent submitted into evidence photographs taken in 2021 depicting warped cabinet shelves. Respondent testified that she could not use the shelves because they were soaked when there was a flood in 2015 and that Petitioner did nothing to repair the shelves. The Court credits her testimony to the effect that the shelves have not been usable from 2015 to the present, although Respondent did not prove which month in 2015 the infestation started. As Respondent

bears the burden of proving the date, the only month in 2015 for which the Court will award a rent abatement is December. Respondent's aggregate rent liability from December of 2015 through December of 2021 is \$85,160.20. The condition of the shelves diminished the habitability of the subject premises by four percent. Four percent of \$85,160.20 is \$3,406.41.

NYCHA records reference a problem with the refrigerator gasket as per an inspection dated April 24, 2018 and a letter that Respondent signed saying that Petitioner remedied the problem. Respondent testified that she did not think much about the letter; that she just signed it; that Petitioner had not fixed the gasket when she signed something to that effect; that the refrigerator gasket is broken and has never been repaired; that cold air comes out of the refrigerator; that she has to push the door hard to close it; that she had told the super about it; that he never got back to her; and that food would spoil very fast, after a week even if the door is closed tightly. NYCHA records still show problems with the refrigerator gasket as per inspections dated August 29, 2019 and July 28, 2021. The January 2020 Stipulation also references the gasket. On this record, Respondent has proven that there had been a defect in the refrigerator gasket from August of 2019 through December of 2021. Respondent's aggregate rent liability for that time period was \$35,243.00. This condition diminished the habitability of the subject premises by six percent. Six percent of \$35,243.00 is \$2,114.58.

### **Electric**

NYCHA records show electrical hazards as per inspections of February 3, 2016, April 13, 2016, April 11, 2017, and August 29, 2019 and that Respondent signed letters dated February 12, 2016, April 14, 2016, and April 24, 2017 saying that Petitioner had remedied the problem. This record is insufficient to comprise a basis for a rent abatement.



## **Bedroom**

Respondent testified that there was mold in the bedroom in 2016; that the bottom of the wall became discolored; that she did not see any water coming from the ceiling; that she told the super about it and she called the emergency phone number; that the super inspected, found that it was dry, and scraped and plastered and painted; that she had to sleep in the living room for over two weeks because of that; that she experienced an allergic reaction when she was in the bedroom; and that she had a CPAP machine that she could not use in the bedroom.

NYCHA records show leak damage in the bedroom ceiling and walls as per an inspection dated October 9, 2018 and a letter that Respondent signed dated October 10, 2018 saying that Petitioner had remedied the problem. Respondent testified that the super fixed the wall by the time she signed that letter and that Petitioner fixed it eventually. Respondent submitted into evidence photographs taken in May and September of 2018 depicting discoloration and leak damage in a bedroom wall and ceiling. Respondent testified that she complained to Petitioner and the super; that she realized that there was water in the light fixture; that no one checked the light fixture; that the light fixture works now; that the leak recurred; that because of the smell she had to sleep in the living room for a month; that she had to take her clothes out of the closet because of the smell and put the clothes in her son's room; that her son was living with her at the time; and that she felt sick.

Respondent submitted into evidence a photograph taken in 2019 of leak damage on the ceiling 2019. Respondent testified that water started to seep at the bottom of the wall; that she let the super know but nothing was really done until it got worse, meaning there was discoloration; that this was repaired; that they scraped plaster off and repainted it; that she made this a part of an HP proceeding; that Petitioner came in October or November, six months after

the condition started; and that there was a smell from this leak damage that caused her to sleep in the living room.

Respondent's Friend testified that he saw and smelled the mold in the bedroom.

Respondent's un rebutted testimony showed that this condition was in the bedroom of the subject premises from May to October of 2018 and May to October of 2019. Respondent's aggregate rent liability during this time was \$12,166.00. This condition diminished the habitability of the subject premises by eighteen percent. Eighteen percent of \$12,166.00 is \$2,189.88.

### **Hallway closet**

Respondent submitted into evidence photographs taken in May and July of 2018 depicting discoloration in a hallway closet. Respondent testified that there had been pieces of plaster in the closet that she observed on the floor and the shelves; that she had to move everything out of the closet; that there are holes near the bottom of the wall in the closet; that she told the super; that the super checked and looked at it; that the problem lasted until October of 2019; that she told the super on an ongoing basis about this problem; that she experienced an unpleasant smell from the closet; that Petitioner put back sheetrock without cleaning it; and that she did not use the closet because it was not safe because she believes that the mold is still behind it; but the HPD inspector did not find mold.

Respondent proved that this condition was present from May of 2018 through October of 2019. Respondent's aggregate rent liability for this time period was \$19,528.00. This condition diminished the habitability of the subject premises by three percent. Three percent of \$19,528.00 is \$585.84.

### **Son's Bedroom**

NYCHA records showed leak damage in a ceiling over a window as per an inspection dated August 29, 2019. Respondent submitted into evidence a photograph dated in 2020 depicting discoloration and leak damage there. Respondent testified that there was a brown stain in the ceiling over the window; that she called the super, who looked at it; that the problem then stopped; that the super scraped and painted over it; that she did not use the room but it was her son's room; that she threw out an air conditioner and had to get another one and paid for it herself.

The combination of the NYCHA records and the photograph prove that the problem existed from August of 2019 through 2020 although the record does not show what month in 2020. Respondent has therefore only proven an extent of a problem through January of 2020. Respondent's aggregate rent liability from August of 2019 through January of 2020 was \$7,182.00. This condition diminished the habitability of the subject premises by six percent. Six percent of \$7,182.00 is \$430.92.

### **Living Room**

NYCHA records show leak damage to the wall and ceiling as per an inspection dated August 29, 2019. Respondent submitted into evidence a photograph depicting leak damage near the bottom of the wall. Respondent testified that Petitioner came in October 2019 to paint; that she moved a cabinet and saw the leak damage; that the wall adjacent to the kitchen was wet by the brown spots; that Petitioner did scrape and paint; that this condition caused a smell and she also could not take the smell of the paint; that she was scared that the wall was going to fall.

Respondent proved that there was a condition in September and October of 2019 in the living room. Respondent's rent liability for those two months was \$2,388. The condition of the

living room diminished the habitability of the subject premises by five percent. Five percent of \$2,388 is \$119.40.

### **Repair and deduct**

Respondent testified that her oven did not work in July of 2020; that she called Petitioner's emergency number; that Petitioner did not fix the oven; that on Labor Day she paid a friend herself \$200 to repair the oven.

Respondent's Friend testified that Respondent's oven was not working; that after six months of her complaints, he fixed the stove up for her at Christmas time; that she paid him \$275; and that he had worked with his father who repaired stoves.

In order for a tenant to collect damages for a tenant's payment to repair what was a landlord's duty to repair, the tenant would have to prove, *inter alia*, a landlord's willful refusal to make those repairs. Katurah Corp. v. Wells, 115 Misc.2d 16, 17 (App. Term 1<sup>st</sup> Dept. 1982). The proof adduced at trial was insufficient to show a willful refusal. Respondent's testimony that she paid Respondent's Friend to do perform the repair work almost four month before Respondent's Friend said that his repair work occurred further underscores Respondent's inability to prove by a preponderance of the evidence a time frame that would be probative of Petitioner's level of intent in failing to repair the oven.

### **Conclusion**

As noted above, the total amount of rent arrears Petitioner proved through December 31, 2021 was \$34,927.47. The total amount of rent abatements the Court awards herein is \$38,798.23 through December 31, 2021. Offsetting the rent arrears against Respondent's counterclaim leaves an amount in Respondent's favor of \$3,870.76.

Accordingly, it is ordered that the Court dismisses the petition with prejudice through December 31, 2021 and it is further ordered that the Court awards Respondent a final judgment against Petitioner on her counterclaims in the amount of \$3,870.76 through December 31, 2021.

It is further ordered that the Court directs Petitioner to correct the leak condition that the evidence shows remains in the white bathroom; that “correcting” the condition means that Petitioner must correct the source of the water penetration, not just the resultant leak damage itself; that Petitioner must correct the defective refrigerator gasket; and that Petitioner must correct the defective shelves in the kitchen, all before July 28, 2022, on access dates to be arranged by counsel for the parties. On default of this order, any party may restore this proceeding for all appropriate relief.

This constitutes the decision and order of the Court.

Dated: Brooklyn, New York  
June 28, 2022



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HON. JACK STOLLER  
J.H.C.