2022-11-30

Torres v. Sedgwick Ave. Dignity Devs. LLC

[*1]

Torres v Sedgwick Ave. Dignity Devs. LLC
2022 NY Slip Op 51176(U)
Decided on November 30, 2022
Civil Court Of The City Of New York, Bronx County
Ibrahim, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected in part through December 5, 2022; it will not be published in the printed Official Reports.

Decided on November 30, 2022

Civil Court of the City of New York, Bronx County

Jason Torres, Petitioner,

against

Sedgwick Avenue Dignity Developers LLC, JOHN WARREN & MHR MANAGEMENT INC., Respondents-Owners, and DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK, Co-Respondent.

Index No. 307644/2020

TakeRoot Justice (Rajiv Jaswa and Allen Joslyn of counsel) for petitioner.

Rosenblum & Bianco, LLP (Tracy Boshart of counsel) for respondents.

Shorab Ibrahim, J.

In this Housing Part (HP) proceeding petitioner sought, *inter alia*, an order to correct conditions in the subject apartment, and a finding that the respondents have harassed him. (*see* NYSCEF Doc. 1). The court issued an order to correct on April 22, 2021. (*see* NYSCEF Doc. 28). In doing so, the court found that petitioner and respondents are proper parties, that

violations existed in the apartment, and that no defense to an order to correct was raised in the February 16, 2021 answer. (*see* NYSCEF Doc. 6).

Petitioner alleges harassment based *solely* on the respondents' alleged failure to correct hazardous conditions over an extended period. (*see* NYSCEF Doc. 1 at par. 20 and 27). The petition refers generally to "conditions" in the plural, and specifically to water leaks dating back to 2013. (*id.* at par. 20, 21 & 27). In their answer, respondents allege, *inter alia*, lack of access (so that violations could not be corrected in allotted time frames) and that respondents harbor no intent to harass the petitioner. (*see* NYSCEF Doc. 6).

After trial of the harassment claim, the court makes the following findings of fact and conclusions of law.

DISCUSSION

THE LAW

§ 27-2005(d) of the Administrative Code of the City of New York (NYC Admin Code) provides that "[t]he 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." This provision was enacted "to address a perceived effort by landlords to empty rent-regulated apartments by harassing tenants into giving up their occupancy rights ...." (*Dani Lake LLC v Torres*, 64 Misc 3d 1231(A), *8, 2019 NY Slip Op 51383(U) [Civ Ct, Bronx County 2019] *quoting Aguaiza v Vantage Props.* 69 AD3d 422, 423, 893 NYS2d 19 [1st Dept 2010]).

"Repeated failures to correct hazardous or immediately hazardous violations relating to [*2]a dwelling unit within the time required for such corrections" can constitute harassment of a lawful occupant. (*see* NYC Admin Code § 27-2004 (a)(48)(b-2); *Garcia v Adams*, 71 Misc 3d 1205(A), *6, 2021 NY Slip Op 50283(U) [Civ Ct, Kings County 2021]; *Coleson v Sarker*, 73 Misc 3d 1010, 1012, 157 NYS3d 896 [Civ Ct, Bronx County 2021]). Class "B" violations are "hazardous" and class "C" violations are "immediately hazardous." (*see Notre Dame Leasing, LLC v Rosario*, 2 NY3d 459, n.1, *citing* NYC Admin Code § 27-2115(c)(2), (3)).

Consequently, petitioner must prove multiple instances of respondents failing to correct class "B" and/or class "C" violations within the prescribed time. If he proves this, the statute creates a presumption that such failures [by the landlord] were intended to cause him [the

tenant] to vacate. (*see* NYC Admin Code 27-2004(a)(48)(ii); *Berg v Chelsea Hotel Owner, LLC*, 203 AD3d 484, 164 NYS3d 131 [1st Dept 2022]; *Hucey v Frezza*, 70 Misc 3d 1222(A), *8, 2021 NY Slip Op 50186(U) [Civ Ct, Kings County 2021]; *351-359 East 163rd Street Tenants Assoc. v East 163 LLC*, 70 Misc 3d 1212(A), *6, 2021 NY Slip Op 50055(U) [Civ Ct, Bronx County 2021]).

However, a respondent-landlord may rebut the statutory presumption of intent. (*see Ramirez v Lum*, 73 Misc 3d 1231(A), *5, 2021 NY Slip Op 51211(U) [Civ Ct, Kings County 2021], *citing Cartagena v Rhodes 2 LLC*, 2020 NY Slip Op 30290(U) [Sup Ct, New York County 2020]; *see also Hucey v Frezza*, 70 Misc 3d 1222(A) at *8-9).

THE FACTS

Petitioner's *prima facie* case was established when this court issued the order to correct. The order to correct includes an open violation summary report (VSR) dated April 19, 2021. The VSR includes multiple "hazardous" (class "B") and "immediately hazardous" (class "C") violations, including many that had been open for several *years*. Open violations are *prima facie* proof that the conditions continue to exist. (*see* NYC Admin Code § 27-2115 [f][7]; *DHPD v Living Waters Realty, Inc.*, 14 Misc 3d 484, 487, 827 NYS2d 627 [Civ Ct, New York County 2006]; *Herclues v Bethel Capital, LLC*, 70 Misc 3d 1221(A), *3, 2021 NY Slip Op 50185(U) [Civ Ct, Bronx County 2021] *citing DHPD v De Bona*, 101 AD2d 875, 875 [2d Dept 1984]).

Indeed, respondents basically concede petitioner's *prima facie* case. (*see* NYSCEF Doc. 42 at par. 6 & 7 ["This means that the Petitioner's entire *prima facie* case can be proven by introducing into evidence two documents, the Multiple Dwelling Registration (ownership) and the Building Summary Violation Report Upon submission into evidence of the Building Summary Violation Report the listing of multiple violations for the same "B" or "C" class condition over a period of time should establish the requisite repeated failures to correct based upon additional legal presumptions."]).

Given the above, the court need only summarize petitioner's trial evidence.

Petitioner's first witness, Edward Olmstead (Olmstead), is an industrial hygienist and a licensed mold assessor. Olmstead visited the apartment on February 22, 2021. He found (through observation and tests) high moisture levels at the bathroom ceiling and walls. He found mold spores in the bathroom. He found water damage and mold growth at the kitchen

ceiling, but no recent moisture there.

On or about April 12, 2021, DHPD assessed the following relevant violations in the subject apartment:

1. Class B (Viol # 14226481)—repair the broken or defective plastered surfaces and paint in a uniform color ceiling in the kitchen

2. Class C (Viol # 14226479)—repair the source and abate the evidence of a water leak ceiling in the kitchen

3. Class B (Viol # 14226430)—repair the broken or defective plastered surfaces and paint in a uniform color ceiling in the bathroom...

4. Class B (Viol # 14226428)—repair the source and abate the evidence of a water leak ceiling in the bathroom... (*see* NYSCEF Doc. 28).

These violations corroborated Olmstead's testimony.[FN1]

The April 12, 2021 violations also mirror earlier placed ones.[FN2]

Petitioner testified in relevant part as follows: he does not have a working intercom system;[FN3] the bathtub had numerous issues and was improperly installed at the time of his testimony; the ceiling in the bathroom has been leaking for many years and was leaking, wet and had mold at the time of his testimony; a leak in his bedroom in 2018 caused a ceiling collapse and extensive damage to the apartment and his property; another ceiling collapse in September 2018 injured petitioner; there were leaks at the kitchen ceiling;[FN4] he still had mice and roaches;[FN5] and, he never denied access.

During cross-examination, petitioner acknowledged he had regular contact with the respondents' agents about maintenance issues. Emails between petitioner and respondents' agent acknowledge that some repairs were timely performed, at least in July 2020. A May 4, 2020 email acknowledged that the bathroom ceiling had been opened and repaired a *dozen* times over a four-year period. Petitioner acknowledged that dozens and dozens of workers had come into the apartment over the years to repair conditions he complained about. The workers were responsive, appeared at or around access dates, and attempted to fix conditions. He was adamant, however, that most items did not stay fixed, prompting him to complain and workers to come [*3]back repeatedly.

The court found petitioner's testimony about conditions in the apartment and his interactions with respondents' maintenance staff entirely credible.

John Warren (Warren), a named respondent, was respondents' only witness. Warren is the President of MHR Management (MHR). MHR manages the building. Warren's testimony and documentary evidence established the following: on or about May 14, 2015, the New York City Council approved a thirty-five-year property tax exemption for the subject building.[FN6] The exemption is conditioned on compliance with a Regulatory Agreement (RA). The September 9, 2015 RA (2015 RA) is between DHPD and Sedgwick Avenue Dignity Developers LLC (Sedgwick) and requires that Sedgwick provide affordable housing. Article 4(D) of the 2015 RA bars the landlord from exempting any unit from the requirements of the Rent Stabilization Code (RSC). Article 20 of the 2015 RA requires that units be treated as if they were rent stabilized even if rent stabilization ceased to exist for any reason. The 2015 RA refers to this covenant as "Contractual Rent Regulation."

On April 16, 2021 Sedgwick and HPD entered into another RA (2021 RA).[FN7] The 2021 RA references the City Council Resolution (Art. 3.03). The 2021 RA includes numerous restrictions on rent increases and again subjects the premises to "Contractual Rent Regulation" in the event of rent stabilization's demise.

Both Regulatory Agreements include default provisions that require the owner to perform maintenance. Article 5(A)(iii) of the 2015 RA states that the owner is in default of the RA if violations are not cured within (90) days of written notice from DHPD. Articles 6.02 and 6.03 of the 2021 RA require maintenance and correction of violations within the period set by law. Article 9.01(a) of the 2021 RA requires the owner to annually certify compliance with the terms of the RA.

Warren testified that maintenance of the building is critical to keeping the tax credit. He would have to report a harassment finding to DHPD. Warren further testified the building is in fair condition. Under his management, the boiler was replaced, a new roof was installed, new windows were installed, and pointing was in process. Warren testified that the owner's goal is to provide long-term affordable housing. He denied any intent to make petitioner surrender possession. It could cause the loss of a very valuable tax credit. Alternatively, the landlord derives no benefit from emptying units. A harassment finding would also jeopardize his substantial business ties with DHPD. Warren testified the landlord was responsive to petitioner's complaints and that, in fact, getting his repairs done was a priority.

On cross-examination, Warren acknowledged he had not been to petitioner's apartment. He had not informed DHPD that the owner had violated the RA nor had DHPD threatened to terminate the RA.

Because petitioner established his *prima facie* case for harassment under NYC Admin Code § 27-2004 (a)(48)(b-2), and because petitioner relied exclusively on the statutory presumption of [*4]intent, the sole remaining issue is whether respondents rebutted the presumption.

THE DEFENSE

Good faith attempts to correct violations may be a defense to harassment. (*see Hucey v Frezza*, 70 Misc 3d 1222(A) at *8).

Petitioner credibly testified that respondents were responsive to his complaints; they consistently sent workers; those workers appeared on or about arranged access dates; and repairs were made. Petitioner adamantly disputed the *quality* of respondents' efforts. Respondents did not offer any testimony from anyone who had been in the unit to do repairs. Consequently, the court cannot hold that good faith attempts to do the repairs was established by a preponderance of the evidence. (*see e.g. 133 W 145 LLC v Davis*, 63 Misc 3d 158[A], 2019 NY Slip Op 50850[U] [App Term, 1st Dept 2019]; *3657 Realty Co. LLC v Jones*, 52 AD3d 272, 859 NYS2d 434 [1st Dept 2008]).

It should surprise no one that some unscrupulous landlords in New York City avoid maintaining their properties with the hopes that rent regulated tenants become fed up [with the lack of services] and move out. This has been going for decades due to the significant financial incentive in removing relatively low-paying rent regulated tenants. Numerous cases over the last fifty years have commented on this phenomenon.

In *Reichman v Brause Realty, Inc.*, the landlord purchased a large number of vacant apartments "for the acknowledged objective of converting them into commercial units. The vacancies did not arise from passive acquiescence by tenants, but resulted from unscrupulous and harassing tactics on the part of the defendants." Tactics included removal of the entrance door and replacement of a door set in cinder blocks; permitting the bell and buzzer system to become inoperative; pursuing a course of conduct calculated to irritate and annoy with respect to the services tenants were entitled to, including inspection, repairs and elevator services. (34 AD2d 338, 341-342, 311 NYS2d 629 [1st Dept 1970]).

In *Hartman v New York State Div. of Hous. & Community Renewal*, the Appellate Division affirmed DHCR's 1988 decision finding a landlord guilty of harassment. The landlord wanted to convert to office and luxury residences and sought to force tenants out by denying heat and hot water. (158 AD2d 330, 551 NYS2d 18 [1st Dept 1990]).

The landlords in *Lopez v 352 Cathedral Equites, Inc.* purchased the building "with a view toward emptying the building in order to sell it or to renovate or replace it and charge substantially higher rents." (1994 WL 130907, *5 [Sup Ct, New York County 1994]). The landlords "affirmatively" refused to make any repairs; they were "active participants in a chain of neglect that permitted the building to deteriorate to such an unsafe condition that the tenants could no longer be permitted to occupy it." (*id.*; *see also Prometheus Realty Corp v City of New York*, 80 AD3d 206, 213, 911 NYS2d 299 [1st Dept 2010] (observing that a goal of Local Law 7 is preventing landlords from emptying rent stabilized units by refusing to do repairs so that they can deregulate buildings)).[FN8]

It is against this backdrop that the harassment statute was enacted. (*see Aguaiza v Vantage Props., LLC*, 69 AD3d 422, 423, 893 NYS2d 19 [1st Dept 2010] (the Legislature enacted a harassment statute to address, in part, "a perceived effort by landlords to empty rent-[*5]regulated apartments")).

This court does not suggest that a financial incentive is always required to prove harassment. Frankly, the harassment statute is not so limited. However, when a respondent-landlord establishes they have no financial incentives to empty an apartment or a building, there ought to be some other affirmative proof of intent, especially when it is acknowledged that efforts were made to correct conditions.

In *Allen v 219 24th Street LLC*, 67 Misc 3d 1212(A), *20, 2020 NY Slip Op 50513(U) [Civ Ct, New York County 2020], the court found there was "no ambiguity of Respondents' goal of emptying out the subject premise." In *Allen*, multiple tenants and former tenants established years of maintenance neglect. In addition to the landlord's buyout offers, tenants became so frustrated with the building's conditions that they would sometimes request buyouts themselves. (*id.*). The *Allen* court also considered whether respondents had acted in good faith and found they had not, a determination largely based on respondents' six-and-a-half-year failure to take *any* action to correct serious roof and façade conditions. (*id.* at *16).

Here, in addition to *acknowledged* numerous efforts to address the violations and petitioner's other complaints, Warren credibly testified that the respondents have no reason to

have petitioner vacate his apartment. Respondents established by a preponderance of the evidence and credible testimony that there is no financial benefit to emptying petitioner's unit. On the other hand, a harassment finding could have a negative financial impact, namely the loss of a 100% property tax credit. The documentary evidence substantiated Warren's testimony. Warren also credibly testified that a harassment finding against him would threaten his substantial business dealings with DHPD. Taken together, these facts convince the court that respondents had no intent to cause petitioner to vacate. At a minimum, the respondents rebutted the statutory presumption of intent.

This determination is largely based on common sense and the preference for the simple explanation over the complex. A court may employ common sense when appropriate. (*see Tezca v Cherry*, 2022 NY Slip Op 30530(U), *8-9, 2022 NY Misc. LEXIS 814 [Civ Ct, Kings County 2022]; *Dunbar v 1560 GC LLC*, 71 Misc 3d 1206(A), *3, 2021 NY Slip Op 50291(U) [Civ Ct, Bronx County 2021] c*iting Lloyd v Oestreicher*, 22 Misc. 900, 902, 195 NYS2d 895 [City of New York Mun. Ct, First District 1959] ("Inquiry, observation and experience all lead me to this conclusion"); *see also Medina v Essex Estates*, 72 Misc 3d 1225(A), *7, 2021 NY Slip Op 50868(U) [Civ Ct, Kings County 2021] *citing Swierupski v Korn*, 69 AD2d 632, 638, 419 NYS2d 87 [2nd Dept 1979] ("the simplest of competing theories be preferred to the more complex and subtle")).

The complex theory here is that respondents, having no financial incentive to make petitioner vacate and having a strong financial incentive to do repairs and comply with the RA, intended to make petitioner vacate through poor maintenance, all the while spending considerable time and effort attempting repairs in petitioner's apartment. The simple explanation is that respondents, having the above incentives, simply performed repairs poorly. The court chooses the simpler explanation.

Petitioner's belief that he was targeted because he enforces his rights in court is unsupported. Nothing in the record shows any animus from respondents toward petitioner.

While there are numerous and serious consequences for a landlord that does not correct violations in a timely manner, a finding of harassment, under these circumstances, is not one of them.

Respondents have rebutted the statutory presumption that they intended to cause petitioner to vacate the subject apartment.[FN9] As such, the Court dismisses the harassment cause of action without prejudice to other remedies petitioner may have for conditions or

violations in his apartment, and without prejudice to defenses that the respondents may have.

SO ORDERED,
November 30, 2022
Bronx, NY
SHORAB IBRAHIM, JHC

Footnotes

Footnote 1: Olmstead's testimony was offered, the court presumes, to show that the landlord's efforts to correct leaks and mold conditions, had been unsuccessful.

Footnote 2: Class "B" Viol # 13308075 (issued 10/10/19—broken or defective plastered surfaces at kitchen ceiling; class "B" Viol # 13363891 (issued 10/21/19—repair source and abate evidence of water leak at bathroom ceiling; class "B" Viol # 13363890 (issued 10/28/19)—repair source and abate evidence of water leak at kitchen ceiling; class "B" Viol # 13363889 (issued 10/28/19)—broken or defective plastered surfaces in the kitchen ceiling; class "B" Viol #13723496 (issued 7/16/20)—broken or defective plastered surfaces bathroom ceiling. (*see* NYSCEF Doc. 28).

Footnote 3: There are corresponding violations in the order to correct; Violation # 14226462, # 14006160, and # 13751500 issued between August 2020 and April 2021. These three (3) are all class "A" violations and do not support petitioner's claim of harassment. However, there was an open class "B" violation—# 13723494—issued on July 16, 2020 for "inoperable bell and return buzzer system ..." (*see id*.)

Footnote 4: Much of petitioner's testimony was corroborated by numerous photographs and videos showing conditions in the apartment on various dates.

Footnote 5:A class "C" violation for roach infestation (Viol # 13751511) issued on August 5, 2020 and another (Viol # 14226380) issued on April 14, 2021. A class "C" violation for mice infestation (Viol # 14226382) issued on April 14, 2021. (*see* VSR at NYSCEF Doc. 28).

Footnote 6:*see* https://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=2015092300083003.

Footnote 7:*see* https://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=2021051100755003. The court notes there are other parties to the agreement.

Footnote 8:*see also* Louis W. Fisher, Paying for Pushout: Regulating Landlord Buyout Offers in New York City's Rent-Stabilized Apartments, 50 Harv. C.R.-C.L. L. Rev. 491, 493 (2015).

Footnote 9: The court notes that there were 38 violations subject to the order to correct. By

December 2021, that number was down to 9. (*see* NYSCEF Doc. 44). Currently, there are 4 open violations in the subject apartment. (*see* HPD Building Info (hpdnyc.org) [last accessed on November 23, 2022]). Of the 4 violations, 2 are class "A" violations for essentially the same item and the other 2 are 2015 lead paint violations in "defect letter" status since 2016.

Return to Decision List