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Big Apple Corp. v. Merin

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Big Apple Corp. v Merin

2024 NY Slip Op 33329(U)

September 16, 2024

Civil Court of the City of New York, New York County

Docket Number: Index No. 320225/2022

Judge: Jack Stoller

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART R

----- X

BIG APPLE CORP.,

Petitioner,

Index No. 320225/2022

- against -

DECISION/ORDER

JENNIFER MERIN,

Respondent.

----- X

Present: Hon. Jack Stoller
Judge, Housing Court

Big Apple Corp., the petitioner in this proceeding (“Petitioner”), commenced this summary proceeding against Jennifer Merin, a respondent in this proceeding (“Respondent”), seeking a money judgment and possession of 251 West 81st Street, Apt. 7A, New York, New York (“the subject premises”) on the allegation of nonpayment of rent. Respondent interposed an answer on February 21, 2023 with a defense and counterclaim of breach of the warranty of habitability. The Court held a trial on June 2, 2023, October 13, 2023, March 28, 2024, June 28, 2024, and adjourned the matter for post-trial submissions to August 23, 2024.

Petitioner’s prima facie case

The parties stipulated to Petitioner’s prima facie case, to wit, that Petitioner proved that it is the proper party to commence this proceeding; that there was a landlord/tenant relationship between the parties; that Respondent is a tenant pursuant to the Rent Control Law; that the rent demanded is legal; that Petitioner is in compliance with the registration requirement of MDL §325; that Respondent owed rent arrears; and that Petitioner demanded payment of rent pursuant to RPAPL §711(2) before starting this proceeding.

The parties stipulated that the legal rent from 2018 through the date of the trial has been

\$1,900.62 and that Respondent's rent arrears were \$33,497.16 through June 30, 2023.

Respondent's case: warranty of habitability

Respondent testified that there is a hallway leading to the kitchen and a door that leads to a living room; that there is a door to a small bedroom closer to the front of the subject premises; that there is a short hallway that faces the bathroom and a door that leads to a larger bedroom; that there are short stairs to the front door of the building in which the subject premises is located ("the Building"); that there is a small lobby; that there are buzzers to the apartments outside the Building on the left of the main door; that inside the first smaller lobby is another set of apartments on the right corner toward the second door to the lobby; that there is a main lobby with an apartment directly to the left and directly in front of that is an elevator; that next to the elevator on the right side is a door that leads to a small area that is usually locked; that to the left of the elevator is a stairs way that goes to the other floors of the Building; that the elevator is straight ahead and goes up and down and to the basement; that there are seven apartments on her floor; that she has lived in the subject premises since 1971; and that she normally pays rent by bank check.

Respondent submitted into evidence an order to correct housing maintenance code violations dated November 20, 2020 ("the Prior Order") that issued in a prior Housing Part proceeding concerning the subject premises captioned at Merin v. Scharfman, HP# 851/20 (Civ. Ct. N.Y. Co.).

Respondent submitted into evidence a record of phone calls that she made. Respondent testified that she only called a phone number with a 914 area code when she calls Petitioner; that Petitioner's phone number is on a rent bill; that it has been on her phone; that she has been a tenant since before Petitioner owned the Building; and that she only called Petitioner about

repairs. The phone bill shows calls to the 914 number on September 15, 16, 20, 21, 22, 29, and 30 of 2020 and October 9, 15, and 16 of 2020.

Smoke detector

The Prior Order said that there was a “B” violation for a smoke detector.¹ The Department of Housing Preservation and Development of the City of New York (“HPD”) placed a “B” violation for this condition on September 24, 2018 that was dismissed on June 19, 2019 and another “B” violation placed on October 16, 2020 and dismissed on December 30, 2020. Respondent testified that the smoke detector would start beeping without smoke triggering it; that the issue has been going on for years, both before and during the pandemic; and that she notified Petitioner when it first started happening and when it recurred by telling the super and calling the office.

In the absence of more precise dates on Respondent’s testimony as to the commencement and end of the problem, the Court uses the dates of the violation. As it is HPD’s procedure to give an owner a notice of a violation, N.Y.C. Admin. Code §27-2115(o)(1), and as Respondent’s testimony that she gave verbal notice to Petitioner was unrebutted, the dates of the violations also give rise to an inference that Petitioner had notice of the violations as of those dates.

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). A

¹ A class “A” violation is “non-hazardous” pursuant to N.Y.C. Admin. Code §27-2115(c)(1); class “B” violation is “hazardous” pursuant to N.Y.C. Admin. Code §27-2115(c)(2); and a class “C” violation is “immediately hazardous” pursuant to N.Y.C. Admin. Code §27-2115(c)(3).

smoke detector that beeps when there is no smoke diminished the habitability of the subject premises by one percent. Respondent's aggregate rent liability for the ten-and-a-half months that the violation had been in place \$19,956.30. One percent of \$19,956.30 is \$199.56.

Kitchen

HPD placed a "B" violation for loose kitchen floor tiles on April 14, 2018 and an "A" violation for the same condition on March 6, 2019, a violation that HPD dismissed. The Prior Order said that there were "B" violations for a leaky kitchen sink and kitchen floor tiles, although it said that the kitchen floor been corrected. HPD placed another "B" violation for leaky faucets on March 6, 2019 that was dismissed on June 19, 2019 and again on October 16, 2020 that was dismissed on December 30, 2020. HPD placed a "B" violation for a defective strainer on September 24, 2018, marked complied as of June 19, 2019 and a "B" violation for an obstructed wasteline on March 6, 2019, dismissed as of June 19, 2019. The Prior Order says that there is a "B" violation for a broken kitchen window placed on November 6, 2020 and dismissed on March 10, 2021. Respondent testified that the windows in the kitchen and bathroom were sticking. The Prior Order said that there is an "A" violation for a kitchen cabinet door. HPD placed another violation for the same condition on February 6, 2021. The Prior Order said that there were "B" violations for plastering and painting the ceilings in the kitchen and the foyer, placed on October 16, 2020 and dismissed on December 30, 2020.

Respondent testified that it is difficult turn the kitchen sink faucets off; that the faucet has been a problem for years, before the pandemic; that the cold faucet produces water that is too hot to drink; that the metal on the faucet is too hot to touch; that the sink was leaking from a faucet

Notre Dame Leasing LLC v. Rosario, 2 N.Y.3d 459, 463 n.1 (2004).

and a drainpipe that caused the tiles to be loose on the floor, which made them a trip hazard and moldy and malodorous besides; that this issue has been going on for a decade or more; that Petitioner put in a new unit when Petitioner fixed the pipe underneath the sink in 2020 or 2021; that it does not close all the way; that the metal being hot has been an issue for decades; that she notified Petitioner on dates that she did not remember, by mentioning it to the super when she saw him; that she also left messages on the answering service; that Petitioner sent people who do work and they do not do the work properly; and that she has to keep water separate because she has no cold water.

Respondent submitted into evidence a photograph of the underside of the kitchen cabinet taken in May of 2023. Respondent testified that it has looked like that since the underside of the sink was fixed and that there was a leak under the sink that rotted the wood and caused the cabinet to fall apart. Respondent submitted into evidence a photograph of the underside of a sink before 2020. Respondent testified that she notified Petitioner but did not remember the date; that Petitioner did some work on the condition, but the door is not properly fitted; that it is unsightly; that sometimes the cabinets are hard to open; and that this problem had lasted from before the pandemic.

Respondent testified that the kitchen cabinet fell apart and disintegrated, essentially, destroying personal property kept there; that the cabinet was never replaced; that the condition was repaired; that she called Petitioner's office about this condition over and over again; that eventually Petitioner sent someone to fix after a judge ordered it; that when she came into the subject premises there would be water on the floor and she could not enter the kitchen and she was concerned that the mold would affect her health; that the cabinet doors would not close properly after the leak had been ongoing for a time; that tiles were removed; that the sink was

still leaking; that the cabinet was still there; that Petitioner sent her pictures of tiles to choose from; that they were completely not what had been there before; that she wanted to find tiles that could replace what she had; that someone working for Petitioner said that was fine; that someone offered to provide tiles she wanted for free; that she passed that on to Petitioner, who turned it down; that these tiles were top quality tiles; that tiles were delivered to her; that her own tiles were installed; that the tiles are in place now; that it was an ordeal to get this done; that she was in the position of project manager; that she removed loose and moldy tiles; that she put them in the common area hallway outside the subject premises; that the mold smell came through the rest of the subject premises; that the moldy condition lasted about two years but she did not remember the exact dates; that she notified Petitioner when there was a leak and she kept repeating the communication as the condition changed, like the tiles coming up; and that she reported conditions as soon as she saw them.

Respondent submitted into evidence emails starting on September 10, 2020 about tiles. The emails said that the sink was fixed at that time. Petitioner stated in the emails that the tiles are vinyl. Respondent stated in an email on September 11, 2020 that she did not want a particular kind of tile.

Respondent testified on cross-examination that there was mold in the kitchen floor because of a leak in the sink which was not corrected; that she had full use of the subject premises except for the kitchen; that she did not have use of a quarter of the subject premises; that the kitchen faucet leaks and hot water comes out of the cold water tap; and that she did not remember the dates of the heat being out.

Respondent testified on redirect examination that her doctor advised her to stay out of the kitchen because of the mold.

HPD violations for tiles dating back to April of 2018, violations for leaky faucets dating back to 2019, violations for cabinets, placed in 2021 and 2023, together with Respondent's testimony, demonstrate by a preponderance of the evidence the persistence of a leak condition from the kitchen sink faucets to the cabinets to the tiles in the floor. While there may have been some delay in remedying the problem attributable to Respondent's choice of tiles, the evidence shows these linked conditions lasted from April of 2018 through May of 2023. The condition was not in the same constant state throughout five years, but rather waxed and waned. The average amount that the condition diminished the habitability of the subject premises was sixteen percent. Respondent's aggregate rent liability from April of 2018 through May of 2023, at a rent of \$1,900.62, was \$117,838.44. Sixteen percent of \$117,838.44 is \$18,854.15.

Gas/stove

HPD placed a "B" violation for a lack of gas on February 6, 2021. Respondent testified that the stove tilts forward so that cooking is not even and everything slides to the front of the stove; that the stove has an electric powered-pilot light so that the light does not ignite without extra effort; that a prior stove of hers was leaking gas; that Con Edison turned off the gas in the subject premises; that the new stove is four inches shorter than the old stove that creates a gap that makes it difficult to clean food and grease that gets into the gap; that she had to buy an insert to fall into the gap; that the stove is not flush to the back of the wall and it is positioned between the sink and the partition; and that there is a small metal bin that she put into the gap where the cubby could not be fitted in. Respondent submitted into evidence a photograph of the stove taken in May of 2023.

Respondent testified that the stove was leaking gas; that Petitioner installed a stove that would not fit; that they showed up at 9:30 p.m. to install a stove; that the process was long and

abusive; that Con Edison turned off the gas; that she could not cook for a period of time; that she could not go into the kitchen because she was scared of falling down; that she had to purchase a countertop over to cook anything; that the pilot light went out and gas was leaking from that pilot light; that the top of the stove was peeling off enamel; that she was concerned about it getting into food; that she requested that the stove be fixed; that it was not; that the gas continued to leak; that in the summer she could keep the window open and that was her way of venting the gas fumes; that when it was cold out she had to close the window; that the gas accumulated to the point that she felt it was dangerous; that someone called Con Edison; that the flow was fairly intense; that Con Edison came and shut the gas off; that the gas was shut off until a stove was installed; that she did not remember the date the new stove was installed; that it was months; that Petitioner restored the stove; that her stove was a gas stove with a pilot light that lit the burners; that Petitioner wanted an electric pilot light rather than a gas pilot light; that when they moved the stove out they saw that there was no outlet behind the stove; that they sent in electrician to connect a wire; that the electrician broke open the walls and broke her things; that it affected the overhead light so that it would not go on; that they kept delivering stoves that would not fit; that she looked for models of stoves that would fit; that they sent four stoves that would not fit, one of which was delivered at 9:30 p.m.; that the stove they finally put in was too small so it left a three-inch gap where grease or dirt could fall; that she bought a unit that would fit in there to make the top of the unit would be level with the stove; that she could not cook or boil water; and that she was without a stove for months.

Respondent submitted into evidence emails dated September 22, 2020 and January 31, 2021 about the stove. Respondent submitted into evidence photographs of the stove with a red tag from Con Edison on it, dated January 31, 2021, and photographs of the wall broken up

because of the electrician.

Respondent testified that she had to order food out for months.

The parties stipulated that gas had been turned off.

Respondent testified on cross-examination that Petitioner delivered three stoves to her that did not fit and that Petitioner responded to her communications to them about the stove by sending more stoves.

Respondent submitted into evidence photographs of the kitchen.

Respondent testified that the wall behind the stove is flat; that there is a baseboard; that there was no electric outlet there; that when the electric pilot light was selected an outlet had to be installed; that Petitioner sent an electrician who wanted to open up a line from the ceiling and wire to get an outlet behind the stove; that they discussed that; that there is no cover over the outlet; that she fears vermin can come in; that she has seen roaches since the opening was there; that she has not seen rodents; and that she had an issue with gas for months.

The condition of the stove and the gas diminished the habitability of the subject premises by 15%. B-U Realty Corp. v. Kiebert-Boss, 50 Misc.3d 1220(A) (Civ. Ct. N.Y. Co. 2016).

Respondent's aggregate rent liability for the twenty-nine months from February of 2021 through June of 2023 was \$55,117.98. Fifteen percent of \$55,117.98 is \$8,267.70.

Refrigerator

Respondent testified that her refrigerator did not work for months in 2022 or 2023; that she bought a new refrigerator; that Petitioner's replacement refrigerator was not acceptable; that Petitioner replaced the refrigerator with fridges that overheated, were filthy, had mold in them, or did not fit, and sat in the kitchen blocking the space; that they sent three or four refrigerators to the subject premises; that the refrigerator was very hot to the touch; that she used the

thermometer many times to check the refrigerator; that she used the thermometer daily for health reasons to make sure that she did not have a fever; and that she contacted Petitioner by phone and email.

Respondent testified on cross-examination that Petitioner delivered two or three refrigerators that were moldy and with a lot of dirt inside of them; that the exterior of the refrigerator was very hot; that she measured it with a thermometer; that it was hotter than the thermometer allowed; that she did not measure the temperature of the inside of the refrigerator; that the gasket was filthy; and that the photograph does not depict the dirt.

The photographs do not prove an infringement of the warranty of habitability. The photographic evidence and the absence of HPD violations, despite multiple HPD violations, shows that Respondent has proven by a preponderance of the evidence a rent abatement for this condition.

Toilet

HPD placed a "C" violation on April 14, 2018 for an obstruction in a toilet and dismissed the violation as of June 19, 2019. Respondent testified that the toilet seat is broken and slides and is not secure; that she is afraid of falling; that this condition has existed for two years; that she did not remember how long; that she complained about this condition; that she called the super and called and emailed the office; that Petitioner responded by saying that the toilet seat was not Petitioner's responsibility; and that Petitioner sent someone finally in an attempt to fix the problem but the solution did not fix the issue. Respondent submitted into evidence a video recording taken in May of 2023 showing that the toilet seat is not stable by someone moving it with their hand.

Respondent testified on cross-examination that she did not remember the date that the

issue with the broken toilet seat started; that she remembered that she gave notice; and that she did not remember the date of the notice.

While HPD did not place a violation for this condition, that omission is probative but not dispositive. The video evidence proves the extent of the problem. Crediting Respondent's testimony that the condition lasted for two years, the condition diminished the habitability of the subject premises by four percent. Respondent's aggregate rent liability for two years is \$45,614.88. Four percent of \$45,614.88 is \$1,824.60.

Vermin

Respondent testified that the subject premises has had a horrific moth infestation since January of 2022; that the subject premises also has roaches and waterbugs; that there are rats in the basement; that there are moth traps all over the subject premises and they fill up extremely quickly; that the moths have eaten through three rugs in the bedroom and well as clothing; that the moth infestation began about a year before her testimony, which was taken on June 2, 2023; that she notified the super several times, but she did not remember the first time; and that nothing resulted from the notification. Respondent submitted into evidence photographs taken in May of 2023 showing evidence of the moth infestation. Respondent testified that the roach issue has been ongoing for years; that there were mice as well in the past; that the infestation is in the common area also; and that the rodent issue has been ongoing from before the pandemic.

Respondent testified on cross-examination that the moth infestation occurred in 2022 or 2023 and that she did not recall the date that she gave Petitioner notice of the moths, although she remembered that she did give such notice.

The record does not support a rent abatement for vermin infestation given an absence of a violation from HPD, other corroborating evidence, and the imprecision on dates.

Tub

Respondent testified that there was corrosion in the bathtub even after being reglazed five times and that she is not allowing another reglazing because her doctor told her that it was bad to breathe the fumes. Even if Respondent has a legitimate reason to prevent a reglazing of the tub, Respondent cannot get a rent abatement when she prevents Petitioner from remedying the problem. See LGS Realty Partners LLC v. Kyle, 49 Misc.3d 143 (App. Term 1st Dept. 2015).

Heat

Respondent testified that there is often no heat in the winter and she has to wear several layers of clothing; that she used a thermometer that showed that it was forty degrees in the subject premises; that heat was a problem for years, although more recent; that she complained to the super and called the office; and that she reported it to HPD.

The record does not support a rent abatement for heat given the imprecision about dates and the absence of a violation from HPD.

Front door

Respondent testified that the front door sticks and she has to pull on it to open it; that her prior door was replaced with a metal door because her prior door fell apart; that a couple of years ago she had to call a neighbor to help her open the door; that the front door has been an issue for “years,” before the pandemic; that it was less of an issue when she was younger and stronger; that she notified Petitioner by telling the super and calling the office and the building manager and leaving messages; that she did not get a response from the building manager, whose name was Rine Driver; and that sometimes she can’t get out of the subject premises.

Respondent testified on cross-examination that she did not recall the date that the front door stuck or the date that she gave notice of that condition; that the condition has not been

fixed; and that she called HPD about that condition.

The record does not support a rent abatement for the front door given the absence of a violation from HPD and other corroborating evidence.

Bathroom

Respondent submitted into evidence a video recording of a dripping bathroom sink taken in May of 2023. Respondent testified on voir dire that she shut the water off. Respondent testified that she told super and called the office and that this has been a problem for years, before the pandemic.

Respondent testified on cross-examination that the bathroom sink leaks and that she has called HPD for inspections.

While HPD did not place a violation and the dates of the condition are imprecise, the video recording demonstrates by a preponderance of the evidence an entitlement to a rent abatement. The condition diminished the habitability of the subject premises by six percent. The preponderance of the evidence supports a reasonable inference that the condition lasted for at least nine months. Respondent's aggregate rent liability for nine months is \$17,105.58. Six percent of \$17,105.58 is \$1,026.33.

Totals

The total amount of rent abatements the Court awards is \$30,172.34. Respondent also seeks an award of punitive damages. While a landlord's failure to maintain an apartment can support an award of punitive damages, conduct that gives rise to punitive damages entailed construction performed in a "dangerous and offensive manner in which the landlord permitted the construction work to be performed...." Minjak Co. v. Randolph, 140 A.D.2d 245, 249-250 (1st Dept. 1988). The record does not demonstrate a comparable level of conduct. See 2301 7th

Ave. HDFC v. Hudgen-Grace, 29 Misc.3d 130(A)(App. Term 1st Dept. 2010).

Conclusion

Offsetting the rent abatement of \$30,172.34 against rent arrears through June 30, 2023 of \$33,497.16 leaves a balance of \$3,324.82 as arrears through June 30, 2023. Accordingly, it is ordered that the Court awards Petitioner a final judgment against Respondent in the amount of \$3,324.82. Issuance of the warrant of eviction is stayed through September 23, 2024 for Respondent to pay Petitioner \$3,324.82.² On default, the warrant may issue and execute after service of a marshal's notice. The earliest eviction date is September 24, 2024. It is further ordered that Petitioner must correct outstanding HPD violations on access dates to be arranged by the parties, "B" violations on or before October 16, 2024 and "A" violations on or before December 16, 2024. On default, Respondent may move for appropriate relief, including but not limited to civil penalties and/or contempt.

This constitutes the decision and order of the Court.

Dated: New York, New York
September 16, 2024



HON. JACK STOLLER
J.H.C.

² After a judgment in a nonpayment proceeding, the issuance of the warrant can be stayed for five days. RPAPL §732(2). Five days from this writing is September 22, 2024, a Sunday. If a period of time according to which an act is to be done falls on a Sunday, the act may be done on the next business day. General Construction Law §25-a(1). The next business day after September 22, 2024 is September 23, 2024.