

<b>Vermeer Owners, Inc v Messer</b>
2009 NY Slip Op 33218(U)
August 11, 2009
Civil Court of the City of New York, New York County
Docket Number: 93251/08
Judge: Sabrina B. Kraus
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IVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: HOUSING PART S  
\_\_\_\_\_  
THE VERMEER OWNERS, INC X

Petitioner-Landlord

-against-

**DECISION & ORDER**  
**Index No.: L&T 93251/08**

**HON. SABRINA B. KRAUS**

HELAINÉ MESSER &  
MICHAEL MESSER  
77 SEVENTH AVENUE,  
APARTMENT 2S  
NEW YORK, NY 10011

Respondent-Tenant

THEODORE CORE,  
“JOHN DOE” and/or “JANE DOE”

Respondent-Undertenant

\_\_\_\_\_  
X

**BACKGROUND**

This summary holdover proceeding was commenced by **THE VERMEER OWNERS, INC** (Petitioner) and seeks to recover possession of **Apartment 2S**, at **77 SEVENTH AVENUE, NEW YORK, NEW YORK, 10011** (Subject Premises) based on the allegation that, **HELAINÉ MESSER** (Respondent) she has breached her obligations under her proprietary lease. Specifically, Petitioner alleges that there are offensive odors emanating from the Subject Premises, that the Subject Premises is excessively cluttered, and that Respondent has created a moth infestation in and around the Subject Premises. **THEODORE COWELL** (Undertenant) is an undertenant alleged to be in occupancy, and is the

companion of Respondent. Michael Messer (Messer) was added as a party per court order dated August 11, 2009.

### **PROCEDURAL HISTORY**

Some of the procedural history relevant to this proceeding through and including August 11, 2009 is recited in the Court's order of said date, and will not be repeated herein, but said decision and order is incorporated by reference herein.

Pursuant to said decision and order, the Court denied Respondent's motion to dismiss and granted Petitioner's motion allowing joinder of Messer as a party to this proceeding. The order provided for service of amended and responsive pleadings and set a court date for September 9, 2009.

On September 9, 2009, the parties stipulated that Messer is a shareholder of the Subject Premises. Respondent moved for the Court to conduct a physical inspection of the Subject Premises, which application was deferred by the Court until the conclusion of testimony. A continued trial was scheduled for October 8, 2009, to afford Respondent and Messer an opportunity to present any additional evidence or testimony in light of the joinder of Messer as a party, and the stipulation regarding his status as a shareholder.

Messer filed a verified answer on September 10, 2009.

On October 8, 2009, Respondent and Messer chose to offer no further evidence at trial. Respondent filed an amended answer.<sup>1</sup> Petitioner moved for an order striking defenses in

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1. Two written answers were filed by Helaine Messer, one dated September 10, 2009, and the other on September 14, 2009, they appear identical except that the pleading filed on the 14<sup>th</sup> contains a verification not included in the pleading filed on the 10<sup>th</sup> and the affidavits of service differ.

Messer's answer and striking Respondent's answer. The Court accepted Respondent's answer, and reserved decision on the balance of Petitioner's motion. Respondent's amended answer primarily focused on defenses related to Messer.

The Court set up an inspection of the Subject Premises for 3pm that afternoon.

Later that day, at approximately 1pm, counsel via conference call contacted the Court regarding activity alleged to be taking place at the Subject Premises. Petitioner's counsel asserted that Respondent was cleaning out the Subject Premises, and removing items from the apartment. Petitioner's counsel further alleged that Respondent had moved a shopping cart full of items to Apartment 2R, and that those items were subsequently returned after the Shareholder in Apartment 2R was advised of the scheduled inspection.

The Court, over the phone, directed the parties to preserve the *status quo* and indicated no heavy cleanup or removal of items from the Subject Premises should continue prior to the inspection scheduled for that afternoon.

At 3pm the inspection took place as scheduled.

Subsequent to the inspection, Petitioner moved for an order re-opening the trial to offer newly discovered evidence, as well as testimony pertaining to the incidents that took place at the Subject Premises in between the Court appearance and the inspection on October 8, 2009.

Both of Petitioner's pending motions along with the Court's decision after trial are consolidated herein for disposition.

#### **PETITIONER'S MOTION TO RE-OPEN THE RECORD AT TRIAL**

Petitioner moves to reopen the trial for the purpose of offering evidence it asserts was newly discovered after the close of Petitioner's case. In the moving papers, no specific details

are provided about the alleged new evidence. The affidavit of Petitioner's agent states that the evidence was discovered between June 22, 2009 and October 8, 2009, in the course of performance of his duties as managing agent, and that it will show that Respondent "continues to engage in activity that creates conditions which are harmful ... and a violation of her proprietary lease."

In its reply papers, Petitioner specifies that the new evidence regards an incident which took place in September 2009. The affidavit asserts that Respondent arranged to have a dirty discarded mattress brought from the basement of the Subject Building into the Subject Premises, and that she used it as a bed, and then discarded her own mattress by leaving it by the elevator on the second floor.

It is well settled that a court has discretion either to permit or to prohibit the introduction of evidence, after the party offering the evidence previously rested (*Feldsberg v. Nitschke* 49 NY2d 636). Petitioner's motion is not based on a simple request to reopen to supply defects in evidence inadvertently omitted, and is made after Respondent presented her evidence. Petitioner waited until all parties had rested, and after the court inspection to move to reopen the case. The authorities suggest that an untimely motion to reopen should be denied (*Shapiro v. Shapiro* 151 AD2d 559). Additionally, because the issue of the mattress is collateral to Petitioner's primary claim, and is intended to challenge Respondent's credibility, and further support Petitioner's case, the Court holds that it is appropriate deny Petitioner's motion to reopen the trial for the additional evidence (*Coopersmith v. Gold* 89 NY2d 957).

The second prong of Petitioner's motion seeks to reopen the trial to offer testimony regarding events that occurred on October 8, 2009, between the time the parties left the

Courthouse that morning and the inspection of the Subject Premises that same afternoon. This request for relief is also denied. While the Court's intention in scheduling the inspection without advance notice, was to observe the Subject Premises as ordinarily maintained, it is not unusual that Respondent would make some effort to tidy up prior to the Court's arrival. While Petitioner asserts that Respondent went beyond just making the premises neat, the Court also took into account in evaluating the premises during the inspection the fact that Respondent had made certain alterations in preparation for same.

The Court does not find that additional testimony on this issue would alter the underlying decision herein, and based on the foregoing that prong of Petitioner's motion is also denied.

#### **PETITIONER'S MOTION TO STRIKE**

Also pending before the Court is Petitioner's motion to strike defenses asserted by Messer in his written answer. The Court in determining Petitioner's motion considers whether there is any affirmative defense in the pleading that warrants dismissal of all or part of Petitioner's claim. The Court finds that there is no affirmative defense asserted in Messer's answer which entitles him to relief.

The amended petition was served in accordance with Court order and the requirements of the RPAPL were not applicable, as such the first affirmative defense is without merit. Equally without merit are the second, third, fourth, and sixth through twelfth affirmative defenses, which are simply conclusory allegations unsupported by any testimony or evidence in the underlying record. The Court notes that Messer offered no additional testimony or documentation in support of any of the asserted defenses, although the record was re-opened and court dates set to specifically afford Messer an opportunity to do so.

Messer's second counterclaim, asserting that petitioner deprived him of the quiet use and enjoyment of the Subject premises is dismissed with prejudice. Messer offered no evidence in support of his claim, the evidence in the record contradicts his claim, and given his acknowledgment that he resides in California, and has not occupied the Subject Premises for living purposes at any time it is not even clear that the claim was properly asserted herein.

The only remaining defense asserted by Messer is the fifth affirmative defense that asserts that Messer's tenancy has not been properly terminated. In this Court's August 2009 decision and order no determination was made as to whether or not Messer was a proprietary lessee of the Subject Premises. As noted above, the parties have since stipulated that Messer is in fact a proprietary lessee. While the petition is subject to amendment, the predicate notice is not.

However, this Court previously held in its decision and order of August 11, 2009 that pursuant to paragraph 44 of the proprietary lease between the parties, the predicate notice if served on one proprietary lessee is valid as to all proprietary lessees. Messer has not added anything to the underlying record that would change that determination, as it pertains to the predicate notice served on Respondent, but equally valid as to him given his acknowledged status as a proprietary lessee. Additionally, Messer had actual knowledge of the predicate notice and this proceeding, participated in providing assistance to Respondent to address the conditions raised in the underlying predicate notices, and actively participated in the trial. By these actions Messer has waived the right to object to Petitioner's failure to name him in the underlying notices.

Based on the foregoing the fifth affirmative defense is also stricken.

### **PRIOR PROCEEDING**

At the request of the parties, the Court has taken judicial notice of a prior proceeding between the parties under Index Number 76393/04, and the contents of said file. That proceeding was commenced by Petitioner against Respondent and Undertenant, via a Notice of Default dated March 15, 2004. The Notice alleged that Respondent was in default of paragraph 18(b) of her proprietary lease in that she had maintained the Subject Premises in an unclean, disorderly and excessively cluttered condition resulting in a fire hazard. The Notice further asserted that other residents had complained of offensive odors emanating from the Subject Premises.

Respondent's lease was terminated by notice dated May 20, 2004, effective which June 11, 2004. Respondent appeared in the proceeding through counsel. On June 25, 2004, the initial return date, Petitioner moved for an order allowing it access to the Subject Premises to eliminate odors and remove debris. The parties entered into a stipulation providing that Respondent would abate the offensive odor condition by July 2, 2004, and the proceeding was adjourned to July 16, 2004.

Respondent filed an answer dated June 23, 2004, denying that the conditions alleged existed, asserting that the predicate notice lacked specific factual allegations "of the alleged nuisance", and asserting procedural defects in the notice of termination.

The Court subsequently directed a Resource Assistant to visit the Subject Premises. The visit occurred on July 26, 2004. The Resource Assistant found that there were noxious odors in the Subject Premises and the hallway of the second floor, and also noted that the Subject

Premises was excessively cluttered with debris, boxes, papers , and other items. The Resource Assistant further noted that the patio to the Subject Premises was cluttered with debris.<sup>2</sup>

On August 9, 2004, the parties stipulated that Respondent would remove all clutter from the Subject Premises by August 31, 2004 or Petitioner could move to restore for appropriate relief. The proceeding was adjourned to September 30, 2004 for control purposes.

On October 28, 2004, the proceeding was transferred from the resolution part for trial, and settled by stipulation in the trial part. An inspection by the attorneys was scheduled for November 10, 2004 to determine whether Respondent should be required to take further action to abate any odors or clutter conditions. Petitioner could restore within three months for alleged cat related odors or within six months on the issue of the clutter condition. It was agreed that as of the date of the stipulation there was no odor emanating from the Subject Premises.

It does not appear that the proceeding was restored after said date.

### **FINDINGS OF FACT**

Petitioner established at trial that it is the landlord and proprietary lessee of the Subject Premises (Exhibits 1 & 7). Respondent and Messer are the proprietary lessees of said premises pursuant to an assignment dated on or about January 5, 1984 (Exhibit 7). The Subject Premises are occupied by Respondent as her home, Undertenant previously resided in the Subject Premises with Respondent, but has been an in patient in a long term health care facility since approximately 2006. Messer does not live in the Subject Premises. The building is properly

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<sup>2</sup> Generally a Resource Assistant's report is used only for settlement purposes unless otherwise agreed by the parties. The report was found with the contents of the requisitioned file, and thus the Court reviewed it as part of the agreed upon review of the contents of the file from the previous proceeding. However, this review is only for background purposes, and is not considered as part of the evidence upon which the Court's substantive decision is based.

registered with HPD (Exhibit 2). The Subject Building is a luxury Cooperative Building consisting of three hundred and fifty-three apartments on twenty-one floors.

Petitioner's first witness was **Matthew Abisch**. Mr. Abisch is employed by Orsid Realty as an account executive and property manager. His duties at the Subject Building include responding to the complaints of shareholders, collecting maintenance, and overseeing day to day operations of the building.

The original lease agreement and proprietary lease for Respondent and Messer were never produced. Both parties asserted that they could not find their original document. However, Petitioner laid an appropriate foundation for the admission of secondary evidence and Petitioner, Respondent, and Messer all seek to rely on the proprietary lease and assert claims pursuant to said document. The Court finds that the photocopy of the proprietary lease admitted as Exhibit 7 is the document governing the tenancy of Respondent and Messer.

Mr. Abisch visits the Subject Building approximately once a week, and on such occasions he walks through the common areas of the building to observe the condition of the premises. Mr. Abisch has received complaints from other shareholders residing on the second floor regarding the Respondent. Mr. Abisch testified that the primary complaint was of unpleasant odors and insects emanating from the Subject Premises. After extermination and a court ordered inspection, which took place on April 3, 2009, the number of complaints had decreased.

Petitioner put into evidence copies of some emails from shareholders which complained of Respondent. Exhibit 11D is an email from Jeff Genjian, the shareholder of apartment 2P, who wrote in regards to "Foul Odors Again from Neighbors Apartment". The email is dated April

25, 2007, and states that there is an odor of excrement and vomit, and that the situation has continued for a number of years and is intolerable. The email does not reference either Respondent or the Subject Premises. Exhibit 11E is another email from Mr. Genjian dated February 11, 2008 and provides it is in reference to “Moths from the neighbor”. The email complains that the Subject Premises smells of cats and fecal matter, and had become a source of moths, one of which had found its way into Mr. Genjian’s apartment. Mr. Genjian also complained of what he called “... the weekly hallway gallery and the daily trail of white litter from her (Respondent’s) door to the compact room. Mr. Genjian sent additional emails complaining of the moth problem on March 10, 2008, April 24, 2008, and May 15, 2009 (Exhibits 11[f]-[h]).

Mr. Abisch testified that Petitioner was very concerned about the conditions, and he called the Department of Social Services, and asked that they intervene and try to assist Respondent with problems she appeared to be having in maintaining the Subject Premises. There were several visits by DSS caseworkers to the Subject Building in response to Mr. Abisch’s complaint, but he is not aware as to the result of any such visits.

Mr. Abisch testified that he personally verified that from April 2008 forward, when he walked the hallway of the second floor of the building on his weekly visits there was an odor coming from the Subject Premises that he described as a “urine/cat smell”. Mr. Abisch testified that the intensity of the smell varies and noted that after April 3, 2009, the smell had “improved”, but that prior to that date it had been significantly more offensive.

Mr. Abisch had observed moths in the corner of the hallway where the Subject Premises is located in April or May of 2009. In May 2009, Mr. Abisch had observed a moth trap on top of the door to the Subject Premises.

Prior to April 3, 2009, Mr. Abisch had attempted on several occasions to gain access to the Subject Premises for scheduled inspections, but that Respondent had refused to provide access on those dates. Respondent had consented to an inspection, pursuant to a stipulation dated November 26, 2008. Petitioner was to be provided access for the inspection on December 15, 2008, or any earlier date agreed to by the parties. As of March 19, 2009, no access had been provided by Respondent, and the Court issued an order, over Respondent's objection, directing Respondent to provide access on April 3, 2009 for Petitioner to inspect, and setting a final trial date for April 7, 2009.

Mr. Abisch attended the inspection on April 3, 2009. He described the Subject Premises as slightly cluttered, habitable, and not as dangerous as it had been in the past. Mr. Abisch testified that outside the Subject Premises there remained a slight odor, but that it was much less severe than before. On cross-examination, Mr. Abisch described the Subject Premises as overly furnished, but not a fire hazard.

Mr. Abisch testified that in May 2009 he smelled a foul odor right outside Respondent's door in the hallway, and that the odor was not discernible in any other part of the hallway except by the Subject Premises. Mr. Abisch testified that the two apartments closest to the Subject Premises, on the second floor, were 2R and 2P.<sup>3</sup>

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<sup>3</sup> Exhibit 10 in evidence is a drawing showing the layout of the second floor of the Subject Building.

The Court found Mr. Abisch to be an extremely credible witness.

The second witness for Petitioner was **Yvonne Lorber**, who is seventy-four years old, and resides at Apartment 2S at the Subject Building. Ms. Lorber has lived in Apartment 2S since 1981, and testified that she had been subjected to foul odors on the second floor. Ms. Lorber testified that on bad days the odor is apparent as soon as she turns the corner of the hallway from the elevator.<sup>4</sup> Ms. Lorber testified that the odor smells “like a homeless person”, dirty, unwashed and unpleasant. Ms. Lorber found the odor in the hallway quite embarrassing on occasions where she had visitors to her home. Ms. Lorber was able to trace the odor, using her sense of smell, as emanating directly from the Subject Premises. Ms. Lorber testified that the closer she came to the Subject Premises, the stronger the odor became. Prior to coming to court to testify that day, Ms. Lorber approached the Subject Premises and found that the odor was not as strong as usual, but still noted that “it smells, it smells, it smells.”

Ms. Lorber will sometimes try to hold her breath for the period of time between when she gets off the elevator and gets into her apartment. Ms. Lorber testified that the odor is not discernible once she is inside her own apartment. Ms. Lorber has complained of the odor to the doormen in the building and the managing agent. Ms. Lorber found that the presence of the odor was not consistent, and that while there would be occasions where it would seem to be gone, it would always come back.

Ms. Lorber testified that previously to address the problem, in or about 2003, a large fan had been installed which ran twenty-four hours a day for a period of approximately three weeks.

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<sup>4</sup> As noted below, this is the same location in the hallway where the Court experienced the foul odor on the October 2, 2009 inspection.

Ms. Lorber also testified that Respondent periodically uses the hallway to place her belongings, while she works on the inside of the Subject Premises. Belongings that Ms. Lorber has observed Respondent leaving in the hallway include a shopping cart, furniture, and boxes. On such occasions, Ms. Lorber observed that the door to the Subject Premises is left open.

The next witness for Petitioner was **Jeffrey Michael Genjian**, who has resided in Apartment 2P at the Subject Building since 1992. Mr. Genjian testified that there is an odor permeating the second floor of the Subject Building that he described as a cat fecal smell. The first time Mr. Genjian complained about the odor from the Subject Premises was around Christmas of 2003. Mr. Genjian is affected by the odor every time he walks out of the door to his apartment. Mr. Genjian has observed moths flying outside the Subject Premises and a persistent trail of cat litter, a white flaky substance, that requires constant vacuuming in the second floor hallway. Mr. Genjian testified that these conditions are coming from the Subject Premises.

Mr. Genjian experienced the odor was emanating from the Subject Premises as recently as the morning of his testimony, and stated that he smells the odor every day. When Mr. Genjian has family visit, they have commented on it. The odor has affected Mr. Genjian by embarrassing him in front of visitors and guests, and he is concerned it may negatively impact his ability to sell his apartment. Mr. Genjian is also very disturbed by the moths which he has observed on numerous occasions in the hallway, by the door to the Subject Premises and which have occasionally gotten into his own apartment. Mr. Genjian described the moths as tiny, brownish, and about one half inch in size, with wings. Mr. Genjian observed the moths most frequently around the door frame of the Subject Premises.

The next witness for Petitioner was **Arno Alfred Kastner**, the shareholder and resident of Apartment 2U since July 1993. Mr. Kastner has been subjected to unpleasant odors as a result of living on the second floor of the Subject Building. Mr. Kastner said the odors were of dirty cats, cat urine, and unwashed and uncleaned items. He described them collectively as “unfresh” odors. Mr. Kastner stated that these odors were present on and off for the 12 months prior to his testimony, and noted that in the past few weeks, the odor would be strong and then dissipate. Mr. Kastner could tell that the odor was coming from the Subject Premises, by standing directly in front of the Subject Premises and the other doors of the apartments located on that end of the hallway. Mr. Kastner had most recently smelled the odor the week prior to his testimony. Mr. Kastner stated that the odor made it unpleasant for him to walk in the hallway, and he is concerned that it will impede his ability to sell his apartment.

Mr. Kastner observed many months on various occasions by the door of the Subject Premises, but noted that his primary concern with the Subject Premises was the odor. The first time Mr. Kastner observed moths was in 2003. After that period, Mr. Kastner testified that it was okay for one to two years, but that since the summer of 2008, the moths had returned. Mr. Kastner testified that the moths were small, one half inch, and brown. Mr. Kastner stated that he believed the moths were coming from the Subject Premises, but had never actually observed a moth come out of Apartment 2S.

Mr. Kastner had also seen Respondent’s personal property being place in the hallway outside the Subject Premises. Most recently, during the week of his testimony, Mr. Kastner had observed an empty luggage cart outside the Subject Premises.

. The Court found Mr. Kastner to be a very credible witness.

The next witness for Petitioner was **Larry James Kirby**, the Superintendent for the Subject Building. Mr. Kirby manages a staff of fourteen at the subject building, and has been employed in that position since 2006. Mr. Kirby lives in Apartment 2D at the building, and has received numerous complaints about the Subject Premises from other residents. In the twelve months prior to his testimony, Mr. Kirby received complaints regarding foul odors, from the residents of Apartments 2P, 2M, and 2T.

Mr. Kirby has also personally experienced the foul odors emanating from the Subject Premises, which he describes as a stale smell. Mr. Kirby notices the smell at least once a week, and while he does not smell it from his apartment, he has experienced that the odor from the Subject Premises can reach as far as the freight elevator of the building. Mr. Kirby has also seen bugs and insects in the hallway of the second floor of the building, and believes that these are coming from Subject Premises, because he has observed them in particular over, around and underneath the door to the Subject Premises.

Mr. Kirby was able to tell that the foul odor comes from the Subject Premises by smelling the door of the Subject Premises and other nearby apartments. Mr. Kirby was present for the April 3, 2009 inspection, and has only been in the Subject Premises on one another occasion in 2006. Mr. Kirby said that compared to his prior visit in 2006, there was less clutter in the Subject Premises, and the odor wasn't quite as bad. Mr. Kirby testified that the last time he noticed a foul odor coming from the Subject Premises was approximately three months prior to his testimony.

Mr. Kirby testified that in 2008 an inspector from a city agency came to the building, and discussed Respondent's situation with him. Mr. Kirby testified that she came to the building on four separate occasions.

Mr. Kirby stated that Respondent has a practice of removing items from the Subject Premises, and then bringing them back on later occasions. Mr. Kirby has observed Respondent moving furniture, tables, chairs and other items both into and out of the Subject Premises.

The next witness for Petitioner was **Luis Cusicanqui**, a handyman at the Subject Building for the past thirty-one years. Mr. Cusicanqui has received complaints from shareholders in apartments 2R, 2S, and 2P at the Subject Building, primarily about foul odors, but also regarding small flies. Mr. Cusicanqui had been in the Subject Premises on three occasions in 2009, and a total of seven or eight times altogether.

Mr. Cusicanqui had been in the Subject Premises in 2007, but had difficulty accessing the bathroom to complete a necessary repair, because there was too much clutter, and too many plastic bags inside the Subject Premises. Mr. Cusicanqui stated that there were five or six large plastic bags inside the Subject Premises filled with garbage, and that he was unable to observe the living room in the Subject Premises, because there was too much furniture blocking the view. Mr. Cusicanqui did access the bathroom by climbing on top of and walking over the garbage bags.

Mr. Cusicanqui testified that the condition of the Subject Premises was the same on all three occasions he had been in the Subject Premises in 2008. Mr. Cusicanqui described the Subject Premises as cluttered with furniture, including furniture between the kitchen and the living room, and observed that the Subject Premises contained significantly more furnishings

then “normal”. On all three occasions that Mr. Cusicanqui had access in 2008 he testified that the Subject Premises smelled like cats and garbage.

Mr. Cusicanqui had also been in the Subject Premises on three occasions in 2009. The first time was in January or February of that year. Mr. Cusicanqui testified that on said occasion the Subject Premises remained cluttered and continued to have a bad odor, although he stated the odor was not as bad as it had been in 2008. Mr. Cusicanqui was also in the Subject Premises to effect repairs in the Spring of 2009, at which time he noted that the Subject Premises remained cluttered, but that there was no odor. Finally Mr. Cusicanqui stated there was one occasion later the same year, when he described the Subject Premises for the first time as not being cluttered.

Mr. Cusicanqui was not aware of and did not attend the April 3, 2009 inspection. Mr. Cusicanqui never discussed the condition of the Subject Premises with Respondent, because he felt it would be impolite to do so. Between the end of March and the beginning of April 2009, Mr. Cusicanqui observed Respondent working on cleaning the Subject Premises. Mr. Cusicanqui testified that prior April 2009, the terrace of the Subject Premises was a mess, because Respondent had used it as storage and to keep garbage.

The next witness to testify at trial was **Barry Steven Beck**<sup>5</sup>, who was called by Respondent as her first witness. Mr. Beck is employed by Assured Environmental, a company that provides extermination services for vermin. Mr. Beck has been in the extermination business for twenty-five years, but has never been to the Subject Premises or to the building.

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<sup>5</sup> Mr. Beck's testimony actually commenced on May 29, 2009, and resumed on June 1, 2009, after Respondent's motion to dismiss was addressed by the Court.

Mr. Beck was subpoenaed by Respondent to testify, and to produce relevant documents from January 1, 2008 forward.

Assured Environmental had service technicians at the Subject Building once a week for extermination. Technicians would routinely service common areas of the building, as well as any particular units that requested extermination. All records produced by Mr. Beck were collectively admitted as Respondent's Exhibit B. Three service tickets for the Subject Premises were presented, one for services rendered on May 7, 2008 (Exhibit B1) and the other two related to services provided on April 7, 2009 (Exhibits B2 & B3). On May 7, 2008, both the Subject Premises and Apartment 2P were treated for Moths (Exhibit B1). The Subject Premises was also been treated for moths on January 29, 2008, and for roaches on April 7, 2009.

Mr. Beck testified that the clothing moths are related to fabric and material, and that they can damage rugs and clothing. The larva of the moths cause the damage, while the moths themselves lay the eggs. In order for moths to be exterminated, the apartment must be prepared and extensive cleaning must take place, including dry cleaning of all fabric and material in the apartment. Mr. Beck testified that absent such concurrent cleaning extermination services would not cure the moth problem. Clutter conditions inside an apartment can impede the treatment of roaches, and a cluttered apartment would create conditions allowing both moths and roaches to flourish.

The records produced also indicate that on April 22, 2008 treatment was done for clothing moths in closets and drawers of an apartment at the subject building, but the record did not indicate which apartment or floor received such treatment. Records also indicated treatment for clothing moths in Apartment 14A on March 31, 2009.

Mr. Beck testified that generally a moth condition is not easily treated or cured, and that such insects are often found in antiques, cluttered closets, or anywhere items are piled together and not often opened. Mr. Beck described the moths as 1/4 inch long, and bone color . He contrasted this clothing moth to an India Meal Moth, which comes in three different colors and is usually found in pantries or food areas.

The next witness for Respondent was **Joan Schecter** who resides in Apartment 2R at the Subject Building. Ms. Schecter has lived in the building for 18 years, knows Respondent, and attended the funeral of Respondent's mother. Ms. Schecter has previously complained about Respondent to Petitioner and its agents, but made no such complaints in the last three years. Ms. Schecter lives next door to Respondent, and in the past few years, has smelled no foul odors emanating from the Subject Premises. However, Ms. Schecter acknowledged that from time to time she smells a foul odor when coming off the elevator on the second floor. Ms. Schecter described the odor as smelling from dirty kitty litter or cat urine or fecal matter.

Ms. Schecter has observed moths outside the Subject Premises regularly, and that at the time of her testimony she was observing them every other day. Ms. Schecter testified that she had been in the Subject Premises, the day before her testimony at the invitation of Respondent. Ms. Schecter testified that during the visit, she did not observe any bugs or foul odors and that Respondent had invited a number of people over on that date. Ms. Schecter acknowledged that she had been in the Subject Premises a few months earlier, and that it was cluttered to the point where it was not possible to move around inside the Subject Premises. Ms. Schecter stated that Respondent has been working for a long time to remove items from the Subject Premises

Ms. Schechter stated that on her most recent visit to the Subject Premises, the terrace looked lovely, but that on previous occasions she had observed Respondent using the terrace as storage for excess furniture.

Ms. Schechter herself has two cats and two dogs which she keeps in her apartment, and she has two litter boxes for the cats, she keeps one in the bathroom, and one in the living room. Ms. Schechter has had other tenants on the floor complain to her about Respondent and the Subject Premises, including the tenants of Apartment 2P. Ms. Schechter testified that the last time she received such a complaint, she herself had been responsible for the underlying condition complained of. Ms. Schechter had run into a neighbor in the hallway who complained of the smell. When Ms. Schechter opened the door to her own apartment she realized she had left two dirty kitty litter trays by the entrance door to her apartment. This incident took place a few months before the date of her testimony at trial.

Ms. Schechter has not received any extermination services at the building in recent years and refuses offers for such services, because she does not believe the extermination is safe for her pets. Ms. Schechter has experienced problems with moths in her apartment for approximately the last two years. Ms. Schechter described the moths as beige and tiny, and testified that she does not know where the moths are coming from.

The Court found Ms. Schechter to be a credible witness. However, the Court does not accord significant weight to her testimony as it concerns odors emanating from the Subject Premises. Given that Ms. Schechter has two cats and two dogs in her own apartment, and that she has refused extermination services for the moth infestation, the Court finds that Ms. Schechter is

less likely to find the odors offensive, may have a higher tolerance for the conditions than her neighbors, and thus may not be experiencing the odors in the way that her neighbors do.

The next witness for Respondent was **Dorothy Szorc**. Ms. Szorc has known Respondent for 30 years and states that they met because they lived in the same building at that time. Ms. Szorc was in the Subject Premises the day before her testimony, at the same gathering which other witnesses had testified about. Ms. Szorc stated that she had stopped by the Subject Premises for a few minutes, to pick something up, approximately one month ago, but that other than that she has not been in the Subject Premises. The Court did not find the testimony of Ms. Szorc to be entirely credible, and found her testimony to be of little probative value.

The next witness for Respondent was **Michael Messer**. Messer is a retired physician who lives in California, and is Respondent's sister. Benedict C. Messer was the father of Respondent and Michael Messer and is now deceased.

Messer stated that he was aware of the underlying basis asserted for the proceeding. He stated he understood the issue at trial to be whether Respondent cured the lease violations, and whether Messer's rights as a shareholder had been established.

Messer testified that Respondent makes a living from selling photographs and antiques. Messer came to New York for the trial, and was staying with Respondent at the Subject Premises. Messer testified that during the trial and one month previous to the trial he experienced no foul odors, saw no bugs and did not find the Subject Premises to be excessively cluttered.

Messer had also been at the Subject Premises in the Spring of 2008, and at that time the Subject Premises was cluttered. Messer implied that the clutter had accumulated because

Respondent had been focused on caring for her ill partner, Undertenant, and as a result of Respondent's work as an antique collector. At that time the Subject Premises was filled with black plastic garbage bags of items that needed to be discarded. Messer testified that Respondent worked with a professional organizer to eliminate the clutter. Messer lent Respondent \$20,000 to pay the organizer for the clean up of the Subject Premises. Messer does not believe Respondent required assistance in maintaining the Subject Premises. The Court did not find Messer to be a credible witness on the issue of the condition of the Subject Premises. This determination is based in part on his demeanor during his testimony. Additionally, regarding the weight to be accorded his testimony, the Court takes into account that Respondent is his sister, and that he has a fifty percent interest as a proprietary lessee of the Subject Premises.

The next witness for Respondent was **Patricia Parker**. Ms. Parker has known Respondent socially for approximately ten years. Ms. Parker was at the Subject Premises on the same date as the other witnesses presented by Respondent, but had never been to the Subject Premises on any other occasion during their ten year friendship. On the single date that Ms. Parker was there, she found nothing objectionable about the condition of the premises.

**Respondent** testified next on her own behalf. Respondent has a PHD in History from Columbia University and is a photographer and antique dealer. Respondent has resided in the Subject Premises for twenty-five years. Undertenant has not lived in the Subject Premises for the last three years, but is an extended care facility recovering from a serious illness.

Respondent states that there are foul odors at the Subject Building and on the second floor, but she asserts that the odors come from the compactor room. Respondent stated that she

had been aware of the odor as recently as the morning she commenced her testimony in this proceeding .

Respondent testified that she hired Joan Riley, a professional organizer in September 2008. Respondent testified that she wanted to put the Subject Premises in order, and to live better. Respondent stated that due to the nature of her work it is a continuing process. Ms. Riley helped Respondent decide what to discard and what to keep. Respondent discarded many bags full of items, and Respondent got rid of excess clothing.

Subsequently, Respondent changed her testimony, asserting she hired Ms. Riley in September 2007, and was still working with Ms. Riley through February 2008. Respondent testified that she concluded her work with Ms. Riley in June or July of 2008. In addition to being assisted by Ms. Riley herself, Respondent was also assisted in the clean up of the Subject Premise by Ms. Riley's staff. Respondent testified on redirect examination, that when Ms. Riley concluded her work in June 2008, the Subject Premises still needed additional work. Respondent testified that while her files were in good order, they were stacked up, and that the Subject Premises felt more like a storage facility than a home.

Respondent also hired Harold Alvarez to assist her in cleaning the Subject Premises prior to the inspection April 3, 2009. Respondent stated she hired Mr. Alvarez as a housekeeper. Mr. Alvarez washed the floors and windows, swept and dusted the Subject Premises prior to the April 2009 inspection. In the days prior to the April 2009 inspection, Respondent asked staff from the Subject Building for large plastic garbage bags on multiple occasions. Mr. Alvarez also assisted Respondent in removing excess personal property from the Subject Premises.

Respondent testified that she could not recall exactly when she met Mr. Alvarez, but she believes it was in March of 2009. Respondent stated that she had hired Mr. Alvarez 10-15 times between March and June of 2009, and that on occasion Mr. Alvarez also did work with her in her storage rooms.

Respondent's father passed away in 1997. Respondent testified that she took in some of his belongings at the Subject Premises, and that she maintains some of the belongings from her father in storage facilities. For the past fifteen years, Respondent has maintained storage rooms away from the Subject Premises. Respondent maintains one storage room in Westchester, and four additional storage rooms in Manhattan.

Respondent maintains these rooms because the Subject Premises is not large enough for Respondent to keep all of her belongings. Respondent rotates furniture and other belongings from the Subject Premises to the storage facilities. One month before the April 3, 2009 inspection, Respondent moved items from the Subject Premises to the storage facilities. Respondent testified on cross-examination, not credibly, that she couldn't remember if this move was actually just days prior to the April 3, 2009 inspection, rather than one month.

In December 2007, Respondent received a call from Maria Belltrani, on behalf of Petitioner, who advised her that other residents had been complaining about foul odors and insects coming from the Subject Premises. Ms. Belltrani requested an opportunity to inspect the Subject Premises, but Respondent refused. Maria Belltrani, made two requests to inspect the Subject Premises, one in November or December 2007 and one in January 2008, and Respondent refused both requests. Respondent acknowledged that up until a few days before the April 3, 2009 inspection, the Subject Premises were cluttered with personal property and belongings.

Respondent refused to grant Petitioner access to the Subject Premises on dates prior to April 3, 2009, because the Subject Premises was still not in an “appropriate” condition for an inspection, and her reorganization efforts were not complete. Respondent could not answer how many days of cleaning were required, before she would agree to allow Petitioner access for the inspection.

A social worker made two attempts to inspect the Subject Premises in February or March of 2008. On the third attempt, Respondent met the social worker in the lobby of the Subject Building. Respondent did not consent to allow the social worker into the Subject Premises. After that meeting, the social worker made one additional attempt to gain access to the Subject Premises. On that final attempt, Respondent was at home, but would not consent to admitting the social worker into the Subject Premises. The social worker banged on the door to the Subject Premises for about ten minutes, and left, after Respondent refused to open the door.

Respondent acknowledged that she had moths in the Subject Premises, but denied allegations regarding foul odors. Respondent first saw moths in the Subject Premises in late 2007 or early 2008. Respondent did not know where the moths were coming from. By June or July of 2008, the problem had escalated into the public hallway on the second floor, and Respondent requested that Petitioner provide her with extermination services. Respondent did receive such services. An exterminator set off a bomb inside the Subject Premises, which Respondent testified alleviated the problem. Respondent testified that the moths returned approximately one year later.

Respondent has three closets in the Subject Premises. Respondent testified that in March 2009, she cleaned out the closet in the bedroom, and put clothes in storage. Respondent asserted that the closet in the hallway has never been completely cleaned out, and that she cleaned out the

linen closet in the Spring of 2009. The exterminator had advised Respondent that to get rid of the moths, she needed to remove all items from each of the closets. Respondent testified that she never did so, because after the bomb she didn't see more moths, and didn't think it was necessary.

Respondent testified the moth infestation existed in the weeks before her testimony and near the time of the 4/3/09 inspection. Respondent also purchased her own extermination bomb for the moths, from a drug store and set it off in the Subject Premises. When the moths returned, Respondent still did not remove all items from the closets as previously instructed. Respondent again requested extermination services from Petitioner, which were provided in May 2009. The exterminator put poison around the front door to the Subject Premises.

Respondent currently has one cat, that is fifteen years old, and has not been to the Veterinarian since at least 2004. Respondent had two cats for a number of years. Respondent could not recall during which years she had two cats. Respondent changes the litter box once a week, and acknowledged on cross-examination that urine from the cats remains in the litter box for the week. Respondent keeps the litter box in the bathroom. Respondent testified that the litter takes care of any smell from the cat urine and doesn't need to be cleaned to prevent the smell.

The Court did not find Respondent's testimony to be credible. Respondent contradicted her own testimony on numerous occasions. For example, Respondent initially testified that Ms. Riley and her staff did not physically remove garbage and personal property from the Subject Premises, but that their purpose was just to organize items within the Subject Premises.

However, on cross-examination she testified that Ms. Riley and her staff did assist her in removing excess personal property from the Subject Premises.

The Court found Respondent's testimony that she had no photographs of the Subject Premises for any time period prior to April of 2009, given her status as a professional photographer and her twenty-five year residency not credible. Another example of the lack of credibility by Respondent is the pictures she offered into evidence. Respondent testified that the pictures were taken on April 3, 2009 (Exhibits A1-A6), and more accurately reflected the condition of the Subject Premises on that day than the photographs put into evidence by Petitioner. However, she later acknowledged that she had rearranged items and changed the place of various pieces of furniture, prior to taking the photographs but after the inspection had ended. Respondent offered no credible explanation for this.

Respondent's testimony on how she maintained the closets in the Subject Premises was contradictory. Respondent initially testified that she had never entirely emptied the contents of two of the closets, as directed by the exterminator, in trying to eradicate the moth infestation. However, on redirect examination, after the lunch break, Respondent testified that she regularly takes all items out of all three closets every six to eight months. Respondent's refusal to allow inspection of the closets at the 4/3/09 inspection, and the Court's own observation of the condition of the closets at the 10/8/09 inspection make such testimony even less credible.

Respondent did not offer the testimony of any witnesses familiar with the condition of the Subject Premises prior to the commencement of this proceeding. Instead, Respondent had a "witness party," where she prepared the Subject Premises to be presentable, and a week before the trial invited all the prospective witnesses to the Subject Premises, so they could testify about

the condition they observed on that single day. Respondent acknowledged on cross-examination that this was in fact a primary purpose of that gathering. Respondent was unable to offer the favorable testimony of any witness familiar with the Subject Premises, other than on the single date, where she held a gathering and expressly prepared the Subject Premises for said viewing. For example, both Joan Riley and Mr. Alvarez spent substantially more time in the Subject Premises than any of the witnesses from the single night Respondent staged. Yet Respondent called neither of said individuals to testify.

Respondent also acknowledged denying access on other dates to Petitioner, its agents, and social workers because of the condition of the Subject Premises. The overwhelming credible evidence from both Respondent and Petitioner thus supports a finding that through the Spring of 2009, the Subject Premises was in a cluttered and unacceptable condition, and this condition in turn contributed to the problems of foul odors and moth infestation which then spilled into the second floor hallway and detrimentally impacted the other residents of the second floor of the building.

The trial continued on June 22, 2009. The next witness for Respondent was **Mr. Abisch**, who had been subpoenaed by Respondent to testify and produce documents. Mr. Abisch produced log books for the years 2007 through 2009 (Exhibits I1 through I3), maintained by the lobby attendant for Petitioner, which contained some shareholder complaints.

Exhibit I3, the book for 2007 indicates the following complaints made pertinent to this proceeding: a complaint from the shareholder in apartment 2P at 6:30 pm on April 24, stating that the hallway smelled bad, like vomit; and a complaint made on May 3, from the same shareholder

that there were foul smells emanating from the Subject Premises; and a complaint from the same shareholder on November 16 that he found a moth in his newspaper.

Exhibits I1 and I2, respectively the books for 2009 and 2008, contain no notations relevant to the subject proceeding. While there were a few complaints registered by the shareholder from Apartment 2H regarding a dog urinating on the door, 2H is on the other side of the U Shaped hallway from the Subject Premises, and the consistent testimony of the witnesses was that the foul odors did not impact that side of the second floor.

The next witness for Respondent was **Sharon Finn**. Ms. Finn has been friends with Respondent since the 1970s, when they were neighbors. Ms. Finn was at the Subject Premises on the same date as the other witnesses presented by Respondent. Ms. Finn did not recall whether she had been in the bedroom of the Subject Premises on that occasion, but stated that the condition of the Subject Premises seemed fine. Prior to that occasion Ms. Finn had not been in the Subject Premises for approximately fifteen years.

**Court Inspection** - As discussed above, on October 8, 2010 the Court conducted an inspection of the Subject Premises. The inspection took place at approximately 3 pm. When the Court arrived at the building, Respondent was upstairs in the Subject Premises. A porter was stationed, on the second floor, at the beginning of the corridor leading to the Subject Premises. The inspection of the Subject Premises lasted for approximately ten minutes.

The Court found that the Subject Premises was cluttered. While there was free access into and out of all rooms, the actual amount of items in the Subject Premises was significantly greater than photographs in evidence or testimony had indicated. It appeared that one or more means of egress was blocked by stored items, particularly in bedroom of the Subject Premises and possibly

in the Kitchen as well. The condition the Court found in the bedroom was a series of what appeared to be doors leaning against an entire exterior wall of the bedroom. This condition is clearly depicted in the photographs in evidence as Exhibits 15A and 15B.

While there was no foul odor in the Subject Premises at the time of the inspection, the Court notes that every single window was open, the door to the terrace was wide open and there appeared to be a fan or air conditioner running in the bedroom. Additionally, it was a very windy day. Respondent's actions in this regard appear to constitute an attempt at preventing the Court from inspecting what odor would be in the Subject Premises absent such extraordinary measures. The Court concludes that since the inspection took place in October the windows, doors and fan/air conditioner were opened for the purpose of dissipating odors present in the Subject Premises immediately prior to the inspection. This conclusion is supported by the credible testimony of other witnesses regarding odors emanating from the Subject Premises, as well as the odor present in the corridor leading to the Subject Premises on the date of the inspection, which was not dissipated by the measures taken inside the Subject Premises.

The inspection of the Subject Premises also revealed that the interior of the Subject Premises was not well maintained and was in poor condition, it needed basic maintenance such as painting and plastering.

The Subject Premises was clearly more cluttered than it had been on the date of the April 3, 2009 inspection, and it is difficult to imagine what the condition of the Subject Premises had been prior to the \$20,000.00 removal and organization of Ms. Riley and crew, and the cleaning efforts of Mr. Alvarez who allegedly had come in and worked in the hours immediately prior to the Court's inspection.

Respondent did open the closet doors to closets in the Subject Premises, the closets were filled to capacity with various personal belongings. The closets did not appear to have been emptied and reorganized every six months as Respondent had asserted in her testimony

The Court also inspected the entire second floor hallway, and compactor rooms on the second floor. The Court did experience foul odors on the second floor in the hallway, however the odor did not come from the compactor room, contrary to Respondent's testimony. The odor became apparent in the vicinity of Apartment 2M, and in the bank outside the elevators. Apartment 2M is at the beginning of the corridor that leads to the Subject Premises.

The Court did not observe any moths or other insects inside the Subject Premises, or on the hallway of the second floor. There were two air deodorant devices in the hallway by the Subject Premises. There was also one insect trap in the hallway near the entrance door to the Subject Premises.

### **Discussion**

The notice of default upon which the underlying proceeding is based asserts that Respondent had violated paragraph 18(b) of her proprietary lease by allowing the Subject Premises to be maintained in an unclean, disorderly and excessively cluttered condition resulting in a fire hazard, offensive odors, and an infestation of insects.

Paragraph 18(b) of Respondent's proprietary lease (Exhibit 7) provides:

The Lessee shall not permit unreasonable cooking or other odors to escape into the building. The Lessee shall not permit or suffer ... anything which will interfere with the rights of other lessees or unreasonably annoy them or obstruct the public halls or stairwells.

The notice of default further provides that pursuant to paragraph 31(e) of the proprietary lease

Respondent had thirty days to cure the alleged violations. Paragraph 31 of the proprietary lease provides for the termination of the tenancy when “... Lessee shall be in default in the performance of any covenant or provision hereof ... and such default shall continue for thirty days after written notice from the Lessor ...” (Exhibit 7, par. 31(e)).

The notice of default is dated February 12, 2008.

The Court finds that Petitioner did establish by a preponderance of credible evidence at trial that Respondent breached paragraph 18(b) of her proprietary lease by allowing foul odors to exist in the Subject Premises, which permeated the second floor hallway, and by creating a moth infestation. Both these conditions did interfere with the rights of other lessees and did unreasonably disturb them.

Furthermore, the Court finds that Respondent failed to cure the breach prior to the expiration of the cure period, and the termination of her tenancy, or at any point through and including the conclusion of the trial. The weight of the credible evidence establishes that the foul odors continued through the conclusion of the trial in this proceeding, and that the moth infestation remained an issue by Respondent’s own admission through several months prior to her testimony herein.

Additionally, the Court finds that the Subject Premises were excessively cluttered and did create a fire hazard, even on the date of the court inspection, by blocking means of egress. The Court finds that the clutter condition contributed to both the foul odors emanating from the Subject Premises and the moth infestation, and unreasonably disturbed the other second floor residents.

### CONCLUSION

Given the foregoing, the Court finds that Petitioner is entitled to a judgment of possession as against Respondent, Undertenant and Messer. Petitioner is also entitled to a final judgment, for past due use and occupancy in the amount of \$6004.78, as all maintenance due through May 2009, pursuant to Exhibit 9 and the testimony of Mr. Abisch on May 28, 2009. The money judgment is entered as against Respondent and Messer.

Petitioner predicated this proceeding solely on Respondent's breach of lease, and did not plead a cause of action for objectionable conduct, although the facts may have warranted same. Respondent is therefore entitled to a ten day post-judgment period to cure the defaults found to exist by the Court pursuant to RPAPL § 753(4), and to satisfy the judgment for arrears . Issuance of the warrant is stayed ten days from date upon which Notice of Entry of this decision is served upon Respondent and Messer, in order to allow Respondent to cure the breach of lease and found by the Court after trial, and to pay the outstanding use and occupancy.

This constitutes the decision and order of this Court.

Dated: New York, New York  
February 24, 2010

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Sabrina B. Kraus, JHC

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<sup>6</sup> As noted in the Court's August 11, 2009 decision while the answer and notice of appearance filed by counsel only indicate representation of Respondent, counsel in an affirmation submitted to the Court on January 30, 2009 asserted that he represented by Respondent and Undertenant.