Schwesinger v Perlis
2020 NY Slip Op 34455(U)
December 14, 2020
Civil Court of the City of New York, New York County
Docket Number: L&T 67376/18
Judge: Jack Stoller
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART L
-- X
ERIC SCHWESINGER

Petitioner,

Index No. L&T 67376/18

- against -

DECISION/ORDER

DONALD PERLIS and SONGHEE DEBARBIERI,

Respondents.
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Present: Hon. Jack Stoller
Judge, Housing Court

Eric Schwesinger, the Petitioner in this proceeding ("Petitioner"), commenced this holdover proceeding against Donald Perlis ("Respondent"), a respondent in this proceeding, and Songhee Debarbieri, ("Co-Respondent"), another respondent in this proceeding (collectively, "Respondents"), seeking possession of 110 Duane Street ("the Building"), Apartment 5R, New York, New York, ("the subject premises"), on the ground, *inter alia*, that Respondents have committed a nuisance. Respondents interposed an answer containing defenses of retaliatory eviction and laches. The Court held a trial of this matter on January 7, 2019, February 8, 2019, May 6, 2019, May 15, 2019, January 14, 2020, January 15, 2020, February 7, 2020, September 22, 2020, and September 25, 2020 and adjourned the matter to November 16, 2020 for post-trial submissions.

Background facts established by the record and general subjects

Respondent has lived in the subject premises for approximately forty years. The subject premises was not a residential property when he first moved in. The subject premises was eventually legalized for residential use and Respondent became a rent-stabilized tenant as of 1989. The Building subsequently converted to condominium ownership, although Respondent

maintained his status as a rent-stabilized tenant after the conversion. Co-Respondent moved into the subject premises with Respondent in 2008. The subject premises is located on the fifth floor of the Building. There are two units on the fifth floor of the Building. Petitioner purchased the other unit on the fifth floor of the Building and resides there. Petitioner purchased the subject premises as a condominium unit while Respondent remained in occupancy as a rent-stabilized tenant by a deed dated April 9, 2013. Petitioner is in compliance with the registration requirements of MDL §325.

Petitioner testified that the subject premises and his apartment are separated by a 350-square foot hallway; that he once had a congenial relationship with Respondent; and that Petitioner installed security cameras outside the front door of the subject premises.

Petitioner testified on cross-examination that he had offered Respondents a buyout after he had purchased the subject premises. Respondent introduced into evidence an email that Petitioner sent Respondent on January 15, 2016 offering Respondent $500,000 to move out or to renovate the subject premises so that some of it would be reconfigured so as to be in Petitioner's apartment.

Respondent testified that his relationship with Petitioner was cordial when Petitioner first purchased the subject premises and that their relationship worsened when Petitioner expressed intentions on reclaiming the subject premises for himself, began refusing Respondent's rent checks, removed Co-Respondent's name from the doorbell, and installed cameras in the fall of 2013, solely directed at Respondent.

Conduct captured by security cameras

Respondent testified that the security cameras gave him anxiety and that he covered his face when in view of the cameras. Petitioner introduced into evidence footage dated October 9, 2013

from the security cameras depicting someone walking with a bag on their head and holes exposing the person's eyes; footage dated October 10, 2013 of a person with a bag over their head while gesturing a middle finger to the camera; and footage dated October 14, 2013 of someone with a bag over their head. Petitioner's nanny testified to seeing a masked man in the hallway between Petitioner's apartment and the subject premises. Petitioner testified that Respondent's wearing of a mask had a negative effect on Petitioner's young daughter.

Petitioner introduced into evidence footage dated October 12, 2013 of a person spitting on the camera and footage dated November 11, 2013 of Respondent spitting on Petitioner's newspaper. Respondent testified that he spit on Petitioner's newspaper as a reaction to Petitioner's actions and that he regretted doing so.

Maintenance of personal property in the common area

Petitioner testified that Respondent had occasion to leave personal property in the common areas of the Building. The super of the Building ("the Super") corroborated that testimony. Respondent testified that, out of habit, Respondent occasionally left garbage in the hallway, as the building personnel had previously picked it up for him. Respondent testified on cross-examination that he never left items in the hallway and that he constantly observed his prior landlord do so. Respondents introduced into evidence photographs of Petitioner's personal belongings in the in the common hallway.

Elevator issues

The Super testified that after he saw security camera footage of Respondent holding the door of the elevator in the Building open, he had to engage a company to repair the elevator because it was not working. Respondent testified that on one occasion he had blocked the elevator doors in an effort to clean the floor after having a grocery bag rip open in the elevator;

that after elevator incident, its door were fully functional; and that Respondent remembers one occasion when the elevator malfunctioned while he was in it, resulting in him climbing out while the elevator remained stuck between floors. Respondent testified on cross-examination that he once double-parked outside of the Building after having gone grocery shopping; that he placed his grocery bags in the elevator, at which point one the bags ripped and caused a substantial mess within the elevator; and that he held the elevator door open on the fifth floor. Petitioner introduced into evidence footage from security cameras dated July 7, 2015 and corroborating Respondent's testimony, although the footage shows an interaction with the Super. Respondent testified on redirect examination that since 2002 the elevator broke several times and that on the incident in question, Respondent did not hear any alarms indicating damage to the elevator or any subsequent sign informing the tenants that it was out of order.

Leak issues

Email communications between the parties on July 1, 2013 and July 13, 2013 concerned a leak from the subject premises to the apartment below the subject premises ("the downstairs apartment"). Respondent testified that when he was notified of a leak into the downstairs apartment on July 13, 2013, he was not home at the time of the call, but Co-Respondent was. Co-Respondent testified that on or about July 13, 2013, Respondent called her during the daytime to inform her that the occupant of the downstairs apartment ("the downstairs neighbor") complained of a leak seeping into the downstairs apartment; that Respondent asked her to check the bathroom floors and for running water or leaks; and that she did not find any evidence of running water or leaks. Respondent testified that he showered later that day. Respondents both testified that they then heard from the Super that more water leaked into the downstairs apartment. Respondent testified that he then went to the downstairs apartment and invited the

downstairs neighbor to inspect the bathroom of the subject premises to prove that everything was dry and that nothing was running.

Petitioner testified that Respondent admitted to causing another leak in September of 2014. Respondent testified that a leak from the subject premises did occur in 2014 as a result a tube from Respondent's fish tank slipping on the floor and unleashing a gallon of water; that the fish tank leak passed through the floor and damaged items in the apartment below; and that Respondent compensated the downstairs neighbor for the damage. Respondent introduced into evidence insurance documents showing the disbursement of a check in the amount of $15,209.72 payable to the downstairs neighbor. Co-Respondent testified to this incident also, although she testified that this leak was in October of 2014.

Respondents both testified about another leak that occurred in March of 2016 caused when Co-Respondent was pouring water into a bowl and then dropped the bowl on the kitchen floor, causing a spill of about three gallons of water. Co-Respondent testified that she immediately cleaned the water up. Petitioner emailed Respondent on March 5, 2016 about this leak. The Super testified that that leak caused water to enter the downstairs apartment. Respondents testified that they filed an insurance claim with regard to this leak to again compensate the downstairs neighbor.

The Super testified that a subsequent leak that occurred in September of 2016 caused extensive damage to the downstairs apartment. Respondent testified on cross-examination that a leak running from the faucet in September of 2016 may possibly have occurred, but he would classify the leak more as a runoff. Petitioner emailed Respondent on September 26, 2016 asking about a leak. Respondent texted a response to Petitioner that simply stated "false" and nothing else. Petitioner testified that he then unsuccessfully attempted to gain access to the subject

premises. Co-Respondent testified that, on September 27, 2016, upon hearing about a leak, she and the downstairs neighbor inspected the bathroom in the subject premises and it was dry. Respondent's counsel then emailed Petitioner on September 28, 2016, claiming that Respondent was not responsible for the leaks, stating that he would regard further communications as harassment, and instructing Petitioner to direct all communication with Respondent through counsel. Despite this direction, Respondent emailed Petitioner directly on September 30, 2016, stating that water was continuously running in the tub in the subject premises. Petitioner emailed Respondent's counsel on October 4, 2016, asking for access. Petitioner testified that he received no response and that the downstairs neighbor reported an active leak on October 17, 2016. Petitioner texted Respondent directly after hearing from the downstairs neighbor, instructing him to shut off the water and telling Respondent that he was sending someone to address leaks. Respondent texted Petitioner back, telling Petitioner to stop harassing him. About an hour and a half later, Respondent's counsel communicated to Petitioner that Petitioner could have access to the subject premises, but for the sole purpose of repairing tiles in the shower. Petitioner testified on cross-examination that he did gain access to the subject premises on October 17, 2016. Petitioner testified on direct examination that the leak continued after that. Respondent's counsel emailed Petitioner two days later, on October 19, 2016 denying that Respondent was responsible for any leak at that time but also stating that Respondent would cooperate.

Petitioner testified that Respondent first granted access to the subject premises on November 3, 2016 at 4 p.m.; that Petitioner was there along with a plumber; that a faucet was leaking that day; and that the people in the apartment concluded that extensive work to repair the leak was required. Petitioner introduced into evidence probes of the wall near the tub in the subject premises taken on November 3, 2016 that revealed gaps in the tiles immediately beneath

the faucet. Further email communications between counsels for the parties ensued, where Petitioner's counsel asked for access on November 15, 2016, and where Respondent's counsel informed that Respondent would be out of town from November 15, 2016 through November 22, 2016 and asked for an access date the day after Thanksgiving. Petitioner testified that he was able to make repairs on November 28, 2016 and stopped the source of the leak. Co-Respondent testified that she showered at a gym after this incident.

Petitioner testified that the downstairs neighbor notified him on May 6, 2018 of a leak originating from a cracked frozen waste pipe in the subject premises. Respondents introduced into evidence photographs of a wet document and a water-damaged art hanging dated May 6, 2018. The occupant of the apartment below the downstairs apartment testified that she observed a leak in her apartment in May of 2018; that she spoke to Respondent about the leak; and that Respondent told her that he did not talk to Petitioner about it because Respondent found Petitioner to be abusive, a conversation corroborated by a contemporaneous text she sent to Petitioner memorializing this conversation with Respondent. Petitioner testified that he observed the pipe in the downstairs apartment; and that he instructed the Super to fix the piping issue. The Super texted Co-Respondent on May 21, 2018 asking for Co-Respondent to call him. The Super testified that Co-Respondent did not call him. The Super texted Co-Respondent again on May 28, 2018, stating that workers wanted to finish the work on May 29, 2018. Co-Respondent texted him back, saying that she could not give access until June 4, 2018. Respondents introduced into evidence an email from an airline confirming a booking for Co-Respondent for a June 2, 2018 flight from Oregon to New York. Petitioner testified that the work on the cracked pipe did not commence until after June 4, 2018. Co-Respondent emailed Petitioner on June 5, 2018, memorializing that Co-Respondent instructed Petitioner to come into the subject premises

for the "sole purpose" of inspecting one area of the subject premises for 15 minutes, with no photos or videos, and stating that Petitioner had to give to Co-Respondent in advance the names of the workers. Petitioner emailed in response that the inspection would need to be more the 15 minutes and that the inspection may require photography and professional assistance. Petitioner testified that he inspected the subject premises two weeks after the repair to confirm that the work had been completed; that during this inspection, Co-Respondent videorecorded Petitioner and restricted him from inspecting the bedroom and living room with a barricade of chairs; and that Petitioner determined that some of the work had been completed but that he could not confirm the status of the work in the restricted areas. Petitioner introduced into evidence a videorecording of this incident. Co-Respondent testified that she built a barricade to keep Petitioner from entering certain parts of the subject premises because she was upset that Petitioner had taken photographs without her permission of other areas of the subject premises that did not need any repair.

Petitioner testified that he helped to clean up the downstairs apartment after the leaks and observed a "massive" amount of water that had come down there.

Respondent testified that he never failed to inform Petitioner or building personnel regarding any leak and never denied them access to make the necessary repairs and that aside from the two leaks he is responsible for, Respondent does not know what the source of the other leaks could be, but that he was in no way at fault. Co-Respondent testified that during the period of 2008 through 2013, she had witnessed multiple leaks and that she never denied Petitioner access regarding any of the alleged leaks.

Discussion

The Rent Stabilization Code permits the eviction of a stabilized tenant from his or her apartment if "the tenant is committing or permitting a nuisance in such housing accommodation …." 9 N.Y.C.R.R Sec. 2524.3(b). A nuisance is a condition that threatens the comfort and safety of others in the building. Frank v. Park Summit Realty Corp., 175 A.D.2d 33, 35-36 (1st Dept.), *modified on other grounds*, 79 N.Y.2d 789 (1991). To demonstrate a nuisance, Petitioner must prove, *inter alia*, an interference with a person's use of land and a pattern of continuity of objectionable conduct, Domen v. Aranovich, 1 N.Y.3d 117, 123-24 (2003), Mautner-Glick Corp. v. Tunne, 38 Misc.3d 126(A)(App. Term 2nd Dept. 2012).

Face Covering, Elevator Damage, Hallway Clutter

Not every annoyance constitutes a nuisance, Domen, supra, 1 N.Y.3d at 123-124. Respondent's covering of his head in the common area of the Building, particularly when no one is there to see him save for a security camera, does not rise to a level that warrants the termination of a tenancy. Nor does Respondent's bobbling of groceries in the elevator and his attempt to cope by propping the elevator door open, particularly in light of Respondent's testimony that he did not hear any alarms from the elevator. And if the placement of personal property in the common hallway constitutes conduct that interferes with Petitioner's use of the common hallway, then why would Petitioner himself leave his personal property in the common hallway, evidence of which Petitioner did not rebut? This record does not support a judgment against Respondents on this basis.

Leaks

Respondents undisputedly caused two leaks serious enough to warrant claims filed with insurance companies, one of which exceeded $15,000, underscoring the significance of the

damage caused. Aside from the leaks that Respondents caused, Respondents did not rebut the evidence of their communication to another resident of the Building that they did not report leaks to Petitioner. Respondents caused unreasonable delays in access needed to repair the leaks. For the leak that occurred in the fall of 2016, Petitioner first notified Respondents on September 26, 2016, and could not get the work done until November 28, 2016, during which time Respondents resisted Petitioner's entreaties, restricted Petitioner's scope of work, and would not let workers in while Respondents were away for periods of time. Similarly, when Petitioner was attempting to repair conditions in the subject premises in May and June of 2018, Respondents attached unreasonable conditions to access, such as time constraints and demands concerning the identities of the workers. Co-Respondent literally constructed a barrier of chairs in the subject premises to limit Petitioner's inspection of the subject premises.

Protracted, uncorrected water leaks can cause serious structural damage, Westhattan Corp. v. Wong, 42 Misc.3d 130(A)(App. Term 1st Dept. 2013), or cause a mold condition. See Rogans Realty Corp. v. Roman, 2012 N.Y. Slip Op. 30287(U)(Civ. Ct. N.Y. Co. 2012). Accordingly, a failure to report leaks constitutes a nuisance. CHI-AM Realty, Inc. vs. Guddahl, 7 Misc.3d 54 (App. Term 2nd Dept. 2005), *affirmed sub nom.*, Chi-Am Realty, LLC v. Guddahl, 33 A.D.3d 911, 912 (2nd Dept. 2006); 17th Holding, LLC v. Rivera, 21 Misc.3d 55, 56 (App. Term 2nd Dept. 2008); Ocean Neck Apts. Co., LLC v. Weissman, 14 Misc.3d 21, 22 (App. Term 2nd Dept. 2006); Gallagher v. Regan, 2004 N.Y.L.J. LEXIS 1174, *12-13 (Civ. Ct. Queens Co.). Moreover, a water leak amounts to an emergency, requiring access. See Richstone v. Bd. of Managers of Leighton House Condo., 158 A.D.3d 551, 552 (1st Dept. 2018). A tenant's failure to allow a landlord access to correct a condition that adversely affects others in a building also can constitute a nuisance. Matter of Strata Realty Corp. v. Pena, 166 A.D.3d 401 (1st Dept.

2018); 12 Broadway Realty, LLC v. Levites, 44 A.D.3d 372, 372 (1st Dept. 2007). All of the leaks damaged the downstairs apartment, evidenced by the unrebutted testimony of Petitioner and the Super.

Respondents argue that limitations they sought to impose protected them against harassment by Petitioner when he, for example, wished to take photographs. But taking photographs is a reasonable means by which to plan to repair conditions or to document the results of a post-repair inspection.

Even if Respondents did not cause leaks other than the two conceded to, their conduct, coupled with actions like Respondent's spitting, rises to the level of a nuisance. Accordingly, Petitioner is granted a final judgment of possession. The enforcement of this judgment is subject to Administrative Order ("AO") 160A/20[1] and Directives and Advisory Notice ("DRP") 213.[2] The Court will restore this matter, pursuant to AO 160A/20 and DRP 213, and to address other matters raised in post-trial memoranda of law on a date to be determined over email with the cooperation of counsel for the parties.

The parties are directed to pick up their exhibits within thirty days or they will either be sent to the parties or destroyed at the Court's discretion in compliance with DRP-185.

This constitutes the decision and order of this Court.

Dated: Brooklyn, New York
December 14, 2020

APPROVED
JSTOLLER 12 14 2020 11 26 59 AM

HON. JACK STOLLER
J.H.C.

[1] AO 160A/20 can be found here: http://nycourts.gov/whatsnew/pdf/ao160a20.pdf

[2] DRP 213 can be found here:
http://nycourts.gov/COURTS/nyc/SSI/directives/DRP/DRP213.pdf