

Ortiz v Dharmnath

2020 NY Slip Op 35683(U)

August 20, 2020

Civil Court of the City of New York, Queens County

Docket Number: L&T Index No. 77049/2017

Judge: Malaika Scott-McLaughlin

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

-----X
EDWIN ORTIZ,

Petitioner-Landlord,

L&T Index No.77049/2017

-against-

DECISION/ORDER

KELLY DHARMNATH,
NAOMI DHARMNATH
All Rooms
First/Ground Floor (Front)
120-17 101st Avenue
Apartment #1F
Richmond Hill, New York 11418

Respondents-Tenants.

“JOHN DOE” and “JANE DOE”

Respondents-Undertenants.

-----X

Present:

Hon. Malaika Scott-McLaughlin

Introduction and Procedural History

Petitioner, Edwin Ortiz, commenced this holdover proceeding against Kelly Dharmnath (“K. Dharmnath”) and Naomi Dharmnath (“N. Dharmnath”)(collectively “Respondents”) to recover possession of Apartment #1F located at 120-17 101st Avenue, Richmond Hill, New York 11418 (“Subject Premises”).

Petitioner issued a Thirty (30) Day Notice of Termination, dated September 27, 2017 (“Notice of Termination”), which provided, in pertinent part, that:

“PLEASE TAKE NOTICE that the undersigned Landlord/Owner elects to terminate your tenancy of the Subject Premises, now held by you under monthly hiring.

“PLEASE TAKE FURTHER NOTICE that, unless you remove from the Subject Premises on or before October 31, 2017, the day on which your term expires, that being more than thirty (30) days from the date of service of this notice upon you, the Landlord/Owner will commence summary proceedings to remove you from the Subject Premises for the holding over after the expiration of your term and will demand the value of your use and occupancy of the Subject Premises during such holding over.”

Thereafter, Petitioner commenced this proceeding by service of a Notice of Petition and Petition, dated November 9, 2017.

Respondent N. Dharmnath appeared and retained The Legal Aid Society as counsel, and she set forth the following defenses in her Answer: (1) general denial; (2) failure to plead the regulatory status as the Subject Premise is rent stabilized; (3) the Subject Premises is rent stabilized and the property has not been registered with the Department of Housing and Community Renewal (“DHCR”); (4) failure to plead the existence of grounds for eviction as required by 9 NYCRR § 2524.3 as the Subject Premises is rent stabilized; and (5) failure to properly plead the regulatory status of the Subject Premises pursuant to Real Property Law (“RPL”) § 741. Additionally, Respondent N. Dharmnath asserted a counterclaim for breach of the warranty of habitability and a counterclaim for legal fees. Respondent K. Dharmnath appeared *pro se* in this proceeding and he did not file an answer. The Court deems Respondent K. Dharmnath’s answer a general denial.

Trial

After various adjournments and motion practice, this matter was assigned to Part Q for trial. The trial was conducted over the course two days – December 17, 2019 and February 6, 2020. On February 11, 2020, the Court conducted a home inspection of the Subject Premises, the property 120-17 101st Avenue, Richmond Hill, New York 11418 (“Subject Building”), the property 120-15 101st Avenue, Richmond Hill, New York 11418 (“120-15 Property”), and the One

Family Dwelling located in the rear of the Subject Building and the 120-15 Property ("One Family Dwelling").

The parties, pursuant to a two-attorney stipulation dated November 25, 2019 ("Stipulated Exhibits"), stipulated to the following exhibits: (1) a copy of the Department of Housing Preservation and Development ("HPD") Property Registration Form, dated August 27, 2019, for the property 120-17 101 Avenue, Queens, New York ("Multiple Dwelling Registration for the Subject Building"); (2) a copy of the HPD Property Registration Form, dated August 27, 2019, for the property 120-15 101st Avenue, Queens, New York ("Multiple Dwelling Registration for the 120-15 Property"); (3) a certified copy of a Deed, recorded May 1, 1986, between Martha Ortiz, as surviving spouse of Jose A. Ortiz, and Edwin Ortiz ("1986 Deed"); (4) a certified copy of a Deed, recorded April 15, 1981, between Jose A. Ortiz and Edwin Ortiz, as parties of the first part, and Jose A. Ortiz and Martha Ortiz, as parties of the second part, ("1981 Deed"); (5) a certified copy of a Deed, recorded November 14, 1974, between Thomas R. Brancaccio and Robert A. Zampino, as party of the first part, and Jose A. Ortiz and Edwin Ortiz, as party of the second part for Block No. 9460 Lot 26 ("1974 Deed"); (6) a certified copy of a Deed, recorded September 8, 1966, between David Brancaccio and Umberto Brancaccio, as executors under the last will and testament of Vincent Brancaccio, as party of the first part, and Thomas R. Brancaccio and Robert A. Zampino, as party of the second part ("1966 Deed"); (7) a certified copy of the City of New York Department of Finance ("DOF") Office of the City Register for Queens County Indenture, recorded April 20, 1922, between Nicholas Murphy and Julia Murphy, parties of the first part, and Francis T. Collins, party of the second part ("1922 Deed"); (8) a certified copy of a Mortgage, recorded September 8, 1966, between Thomas R. Brancaccio and Robert A. Zampino, as mortgagor, and Whitestone Savings and Loan Association, as mortgagee ("1966 Mortgage"); (9)

a certified copy of a Mortgage, recorded November 14, 1974, between Jose A. Ortiz and Edwin Ortiz, as mortgagor, and Thomas R. Brancaccio and Robert A. Zampino, as mortgagee ("1974 Mortgage"); (10) a certified copy of a Satisfaction of Mortgage, recorded February 23, 1988, by Jose A. Ortiz and Edwin Ortiz ("1988 Mortgage Satisfaction"); and (11) a certified copy of a Certificate of Occupancy, dated January 20, 1943, for the One Family Dwelling ("Certificate of Occupancy for the One Family Dwelling").

In the Stipulated Exhibits, the parties also stipulated to the following government records: a certified copy of the Department of Housing Buildings New Building Application for Block No. 9460 and Lot No. 26, dated 1923, with annexed blueprint ("New Building Application and Blueprint"); a certified copy of a City of New York Department of Finance Tax Map, effective date December 8, 2008, for Queens Block No. 9460 and Lot No. 26 ("Tax Map for Block No. 9460 and Lot No. 26"). The parties also stipulated the following DOF records: an undated general building information print out for Tax Block No. 9460 and Tax Lot No. 26 with annexed an attorney affirmation, dated June 5, 2018; and a page of an information ledger, Section 41 Volume 2 page 135, referencing Block No. 9460 and Lot No. 26, dated 1948, and two undated maps of Block No. 9460, with annexed an attorney affirmation, dated August 13, 2019.

Additionally, in the Stipulated Exhibits, the parties stipulated to the following utility services documentation for the Subject Premises and the 120-15 Property: (i) a copy of Petitioner's National Grid bill, dated November 5, 2018, for the 120-15 Property; (ii) Petitioner's National Grid bills for the Subject Building¹; (iii) Petitioner's water bill for the Subject Building, dated March 6, 2018; (iv) Petitioner's water bill for the 120-15 Property, dated March 6, 2018; (v) Petitioner's Skaggs Walsh oil invoices for the Subject Building, dated December 24, 2017, January

¹ The Court notes that the parties stipulated to Petitioner's Exhibit 5 – the National Grid bills for the property 120-17 101st Avenue, Queens, New York, and that said document is missing from the Court's exhibit records.

2, 2018, January 3, 2018 and November 19, 2018, respectively, and a transaction printout, dated March 14, 2018; and (vi) Petitioner's Skaggs Walsh oil invoices for the 120-15 Property, dated December 24, 2017, January 2, 2018, January 3, 2018, and November 19, 2018, respectively, and a transaction printout, dated March 14, 2018.

In the Stipulated Exhibits, the parties stipulated to the Notice of Petition and Petition, dated November 9, 2017, with annexed Affidavits of Service, and Respondent N. Dharmnath's Verified Answer, dated December 27, 2017. Additionally, the parties stipulated to photographs of the following: the common front entrance of the Subject Premises; the common hallway of the Subject Premises; the common shared wall of the Subject Premises; the common rear of the Subject Premises; the mice infestation in the Subject Premises; and the roach infestation in the Subject Premises.

The parties, in a two-attorney Joint Stipulation of Facts, dated November 25, 2019 (Joint Stipulation of Facts"), stipulated to the following facts as detailed below. Petitioner is the Owner and Landlord of the Subject Premises, pursuant to a Deed dated April 4, 1986. Respondents are the Tenants of the Subject Premises. Respondents' use and occupation is \$950.00 per month. Respondents have not paid any use and occupation for the time period September 2017 through January 31, 2019. Petitioner caused to be served a Thirty Day Notice of Termination on or about September 27, 2017. Petitioner caused to be served the Notice of Petition and Petition on or about November 9, 2017. Respondents waived traverse on all notices and pleadings.

The properties located on Block No. 9460 and Lot. No. 26 ("Tax Lot") were purchased by Petitioner and his father on November 7, 1974. Petitioner also owns the building known as the 120-15 Property. The Tax Lot, upon which the Subject Premises is located, also includes the 120-15 Property and the One Family Dwelling in the rear portion of Block No. 9460 and Lot No. 26.

The Subject Building and the 120-15 Property were constructed at the same time, according to the New Building Application No. 18446.² The only Certificate of Occupancy for the Tax Lot is a 1943 Certificate of Occupancy for a one story One Family Dwelling in the rear of the premises.³ The Subject Building and the 120-15 Property, together with the One Family Dwelling in the rear, are taxed together under Block No. 9460 and Lot No. 26.

The Subject Premises is a multiple dwelling duly registered with HPD with the Multiple Dwelling Registration Number 418486 and Petitioner is the Registered Managing Agent. The properties, the Subject Building and the 120-15 Property, each are separately registered with HPD as multiple dwellings and have separate multiple dwelling numbers assigned to them.

The 120-15 Property and the Subject Building have: two separate water lines; two separate water meters; two separate boilers; two separate sewer lines; two separate oil tanks; two separate gas meters and gas lines; two separate doors to the basement; and two separate roof entrances. Neither the Subject Building nor the 120-15 Property have ever been registered as either rent controlled or rent stabilized.

The Subject Building and the 120-15 Property have been conveyed together on at least four separate Deeds dated as follows: April 20, 1922, September 8, 1966, November 14, 1974, April 15, 1981 and May 1, 1986, respectively. The Subject Building and the 120-15 Property had a common mortgage, which was recorded on or about September 8, 1966. The Subject Building and the 120-15 Property had another common mortgage, which was recorded on November 14, 1974.

² The Subject Building and the 120-15 Property were constructed in approximately 1923, pursuant to the New Building Application and Blueprint.

³ The One Family Dwelling was built in approximately 1943, pursuant to the Certificate of Occupancy for the One Family Dwelling.

Other than Petitioner, there are no other employees or workers for the Subject Building and the 120-15 Property. For the Subject Building and the 120-15 Property, Petitioner is solely responsible for: (i) the renovation and repair work for said buildings; (ii) all tax matters relating to said buildings; (iii) handling all tenant issues relating to said buildings; and (iv) collecting the rent from tenants in said buildings.

The Subject Building and the 120-15 Property were purchased with one title insurance policy with Chicago Title Insurance. The Subject Building and the 120-15 Property share a common entrance, a common rear exit, a common hallway and a common backyard as well as an adjoining wall. The basement/cellar for the Subject Building and the 120-15 Property are connected by a tunnel. The Subject Building and the 120-15 Property are contiguous.

At present, Petitioner receives rental income in cash from the tenants in the Subject Building and the 120-15 Property, except for Respondents who pay by check, and Petitioner pays expenses associated with said buildings in cash. Additionally, at present, the rental income from the tenant who pays by check is deposited into a TD Bank Account, and the remainder of the rental income is not deposited into a bank account. Up until two to three years ago, Petitioner deposited rental income from tenants in the Subject Building and the 120-15 Property into the same Citibank Account, and Petitioner paid expenses for said buildings from said Citibank Account.

At least three tenants reside in the 120-15 Property. At least four tenants reside in the Subject Building. There is no Letter of Objection on file with the New York City Building Department. The Tax Lot, Block No. 9460 and Lot No. 26, is currently taxed as a Class C7 building, which is designated as "walk up apartment over six families with store".

In support of his *prima facie* case, Petitioner presented the Joint Stipulation of Facts and the Stipulated Exhibits. Petitioner called no witnesses at trial. Then Petitioner rested on his *prima*

facie case. Thereafter, on consent, Petitioner also entered into evidence Petitioner's DOF Notice of Property Value for the Tax Year 2019 – 2020, dated January 15, 2019 ("Notice of Property Value") for the Subject Premises. The Notice of Property Value describes Petitioner's estimated property taxes for Block No. 9460 and Lot No. 26. The Notice of Property Value listed the property details for Block No. 9460 and Lot 26 as two buildings, designated Class C7 and B Grade, with eight residential units and two commercial units, and that the buildings were constructed in 1930.

On their case-in-chief, Respondents called four witnesses – Respondent N. Dharmnath, Petitioner, Glenn Martin, and Respondent K. Dharmnathi. Respondent N. Dharmnath credibly testified that she has resided at the Subject Premises for approximately nineteen years. She testified that in the Subject Building there are four residential units, two units on the First Floor and two units on the Second Floor, and that in the 120-15 Property there are four residential units, two units on the First Floor and two units on the Second Floor. She also credibly testified that there is a separate building in the rear of the property that consists of a single residential unit. She testified that, during her tenancy, there have been no commercial units in the Subject Building or the 120-15 Property. She testified that three units in the Subject Building are occupied and three units in the 120-15 Property are occupied.

Respondent N. Dharmnath further testified that there have been some conditions in need of repair in the Subject Premises during her tenancy. She credibly testified that, in approximately August 2017, there was a roach condition and mice condition in the Subject Premises. She credibly testified that she notified Petitioner of said conditions during his monthly rent collection and that she could not recall the month or year that she provided Petitioner with notice. She credibly testified that the roach and mice conditions affected her life, because she was unable to leave any

food out in the Subject Premises and she was embarrassed by said conditions. She credibly testified that the roach and mice conditions exist presently in the Subject Premises.

Respondent N. Dharmnath also testified that, in August 2017, there was an unsecured toilet seat condition and that Petitioner repaired said condition. She credibly testified that she could not recall when the toilet seat condition was remedied. She credibly testified that the unsecured toilet seat condition has reoccurred.

On cross examination, Respondent N. Dharmnath testified that the monthly rent for the Subject Premises was \$675.00 when she moved into said unit approximately nineteen years ago. She testified that the current monthly rent for the Subject Premises is \$950.00. The Court finds this testimony was credible.

Respondent N. Dharmnath testified that the roach and mice conditions existed in the Subject Premises prior to August 2017. She credibly testified that she did not provide written notice to Petitioner regarding the roach and mice conditions and that she verbally notified Petitioner. She credibly testified that she did not commence a Housing Part ("HP") action regarding conditions in the Subject Premises. She testified that Petitioner did not inform her that he would exterminate or set mice traps to remedy the roach and mice conditions in the Subject Premises and that her sister, who resides in a neighboring building, contacted an exterminator for the Subject Premises. She credibly testified that she utilized Raid spray and mice traps to remedy the roach and mice conditions in the Subject Premises.

Respondent N. Dharmnath credibly testified that she could not recall the date the unsecured toilet seat condition commenced and that it existed in August 2017. She credibly testified that she could not recall when Petitioner repaired the unsecured toilet seat condition. She credibly testified that she believed that the unsecured toilet seat condition initially was not repaired properly and

that said condition has reoccurred. She then described the entrance archway and the corridor that leads to the One Family Dwelling. There was no redirect examination of Respondent N. Dharmnath.

Respondents then called Petitioner as a witness. Petitioner described the manner in which electrical services are provided to the Subject Building and the 120-15 Property. He credibly testified that the electrical meter for the common areas in the Subject Building is located in the cellar of the 120-15 Property. He credibly testified that there is a crossline from the 120-15 property electrical meter to the cellar of the Subject Building. On cross examination, Petitioner credibly testified that there are two boilers, one for Subject Building and another for the 120-15 Property. There was no redirect examination of Petitioner.

Respondents then called Glenn Martin ("Martin"), a DOE Assistant City Assessor, as a witness. Martin testified that he has been a Real Estate Appraiser since 1997. Martin described the property card for Block 9460 and Lot 26, and the history of Lot 26. In approximately 1921, Lot 26 was one lot and thereafter between approximately 1921 to 1948, Lot 26 was split into two lots thereby creating Lot 26 and Lot 27. Subsequently in 1949, Lot 26 and Lot 27 were merged back into one lot and thus creating the present Lot 26 in Block 9460. He further credibly testified that sometimes an owner constructs a building over lot lines and two lots become one lot and that, in such a case, it is easier for tax purposes to consolidate two lots into one lot. The Court finds this testimony credible.

On cross examination, Martin credibly testified that he had not visited the Tax Lot or the properties on said Tax Lot. He credibly testified that he utilized his company's software program, which is similar to Google Maps, to aerially observe the Subject Building and the Tax Lot as well as reviewed aerial photographs of the properties. He credibly testified that a merging of tax lots

has no connection to the number of buildings on said tax lots. He credibly testified that sometimes a building can cross over tax lines and then there is one building on two tax lots. There was no redirect examination of Martin.

Then Respondent K. Dharmnath testified. He testified that Petitioner does not address conditions in the Subject Premises, despite Petitioner receiving a telephone notification from him. He credibly testified that he works in construction. He testified that he repaired a vanity condition in the bathroom, in the Summer of 2019, and a sink condition in the Subject Premises.

On cross examination, Respondent K. Dharmnath testified that he has lived at the Subject Premises for approximately twenty years and that the current monthly rent is \$950.00. He credibly testified that he was offered another unit in the Subject Building and that he declined said unit. He testified that Petitioner does not perform repairs in the Subject Premises, and he denied that he interferes with Petitioner's access to the Subject Premises to remedy conditions.

On redirect examination, Respondent K. Dharmnath testified that he did not obstruct Petitioner's access to the Subject Premises to effectuate repair conditions. Then Respondents rested.

On rebuttal, Petitioner entered into evidence a Consolidated Edison Important Notice Electric Service Interruption, dated January 2020, for the property 120-15 Property and a Consolidated Edison Important Notice Electric Service Interruption, dated January 2020, for the Subject Building. Then Petitioner rested.

The Court conducted a physical inspection of the Subject Premises, the Subject Building, the 120-15 Property and the One Family Dwelling on February 11, 2020 with all parties and their counsel present. Architecturally, the Court observed that the exterior façade of the Subject Building and the 120-15 Property appear as a common structure with each address on a different

side of the entryway door. Additionally, architecturally the entryway door appears to be made from a different brick and metal than the Subject Building and the 120-15 Property, and it appears to have been added to the exterior facade subsequent to the construction of the Subject Building and the 120-15 Property.

Upon traversing the main entryway, the Court entered an open vestibule with a corridor that provided for access to the Subject Building and the 120-15 Property, and further down the corridor access to the One Family Dwelling. The Court observed common windows utilized throughout the Subject Building and the 120-15 Property. Architecturally, the One Family Dwelling appears to have different windows and exterior facade from the Subject Building and the 120-15 Property, and it appears the One Family Dwelling was constructed subsequent to the Subject Building and the 120-15 Property. The Court observed that the roof of the Subject Building and the 120-15 Property are contiguous, and that one can walk across the roof to access each building from a separate roof entrance door. There is no fire escape for the Subject Building, the 120-15 Property or the One Family Dwelling.

The Court observed separate boilers, electrical lines, basements, basement entrance doors, and roof entrance doors for the Subject Building and the 120-15 Property. The Court also observed that the One Family Dwelling has a common boiler, electrical and sewer system with the 120-15 Property. The Court observed that the electrical lines from the 120-15 Property enter the electrical box in the Subject Building. The Court observed that the tunnel, between the Subject Building and the 120-15 Property, architecturally appears to be similar to a crawlspace rather than a passageway.

Findings of Fact and Conclusions of Law

Petitioner's Claim

Pursuant to Real Property Law ("RPL") § 232-a, an owner may seek to recover possession of an apartment from their month-to-month tenant on the grounds that their tenant's term has expired and after service of the requisite notice upon their tenant. Real Property Actions and Proceedings Law ("RPAPL") § 711 provides, in pertinent part, that "[n]o tenant or lawful occupant of a dwelling or housing accommodation shall be removed from possession except in a special proceeding" and a special proceeding may be maintained on the ground that "[t]he tenant continues in possession of any portion of the premises after the expiration of his term, without the permission of the landlord" (RPAPL § 711 [1]).

Here, based on the documentary evidence, the Court finds that Petitioner established his *prima facie* case and entitlement to possession of the Subject Premises. It is uncontested that Petitioner is the owner of the Subject Premises and that Respondents are the Tenants of Record of the Subject Premises as month to month tenants without a written lease. It is undisputed that Respondents remain in occupancy of the Subject Premises.

Petitioner also seeks an award of use and occupancy. "It is well settled that a holdover tenant retaining possession is liable for use and occupancy of the premises for the period during which the tenant is in possession" (*Beacway Operating Corp. v Concert Arts Soc.*, 123 Misc2d 452, 453 [Civ Ct, NY County 1984]). It is the landlord's burden of proving the reasonable value of the use and occupancy (*see Beacway Operating Corp. v Concert Arts Soc.*, 123 Misc2d 452, 453; *see also Mushlam, Inc. v Nazor*, 80 AD3d 471, 472 [App Div, 1st Dept 2011]).

Multiple Dwelling Law § 301 provides, in pertinent part, that:

"1. No multiple dwelling shall be occupied in whole or in part until the issuance of a certificate by the department that said dwelling

conforms in all respects to the requirements of this chapter, to the building code and rules and to all other applicable law, except that no such certificate shall be required in the case of:

"a. Any class B multiple dwelling existing on April eighteenth, nineteen hundred twenty-nine, for which a certificate of occupancy was not required before such date and in which no changes or alterations have been made except in compliance with this chapter, and

"b. Any old-law tenement, or any class A multiple dwelling erected after April twelfth, nineteen hundred one, which was occupied for two years immediately before January first, nineteen hundred nine, and in which no changes or alterations have been made except in compliance with the tenement house law or this chapter, or wherein:

"(1) two or more apartments are combined creating larger residential units, and

"(2) the total legal number of families within the building is being decreased, and

"(3) the bulk of the buildings is not being increased.

"These exceptions shall not be deemed to relieve any owner from the obligation to make every alteration required in any old-law tenement or other multiple dwelling in compliance with the applicable provisions of this chapter."

In this instance, it is undisputed that the monthly use and occupancy is \$950.00 for the Subject Premises and that Respondents have not paid any use and occupancy from September 2017 through January 31, 2019, 16 months. It is undisputed that there is no Certificate of Occupancy for the Subject Premises and that it is a multiple dwelling. The Subject Building was constructed in approximately 1923 pursuant to the New Building Application and Blueprint. Here, based on the documentary evidence, the Court finds that Respondents are liable for use and occupancy for the Subject Premises (*see Beacway Operating Corp. v Concert Artis Soc.*, 123 Misc2d 452). Therefore, based on the foregoing, Petitioner has established that the reasonable value of the use

and occupancy for the Subject Premises is \$950.00 per month and that there is a balance due of use and occupancy for the time period of September 2017 through January 2019 of \$15,200.00.

Horizontal Multiple Dwelling

Respondent N. Dharmnath asserts as a defense that the Subject Premises constitutes a horizontal multiple dwelling subject to Rent Stabilization Law. She argues that the Subject Building and the 120-15 Property were constructed prior to 1974 and, along with the One Family Dwelling, the buildings constitute an integrated housing accommodation containing at least six units. Thus, she asserts that this proceeding must be dismissed, because Petitioner failed to plead the regulatory status of the Subject Premises; to register the Subject Building with DHCR; and to plead a ground for eviction as required by the Rent Stabilization Law.

Rent Stabilization Code ("RSC") § 2520.11 provides, in pertinent part, that:

"[t]his Code shall apply to all or any class or classes of housing accommodations made subject to regulation pursuant to the RSL or any other provision of law, except the following housing accommodations for so long as they maintain the status indicated below:

(d) buildings containing fewer than six housing accommodations on the date the building first became subject to RSL, unless such buildings are otherwise subject to this Code pursuant to the RSL or other statutes and regulations; for the purposes of this subdivision, a building shall be deemed to contain six or more housing accommodations if it was part of a multiple family garden-type maisonette dwelling complex containing six or more housing accommodations having common facilities such as a sewer line, water main or heating plant and was operated as a unit under common ownership on the date the building or complex first became subject to the RSL, notwithstanding that Certificates of Occupancy were issued for portions thereof as one- or two-family dwellings".

"In determining the existence of a regulated horizontal multiple dwelling, the crucial factor, therefore, is not whether the housing accommodations are part of a 'multiple family garden-type maisonette complex', but rather whether there are sufficient indicia of common facilities, common

ownership, management and operation to warrant treating the housing as an integrated unit and multiple dwelling subject to regulation” (*Salvati v Eimicke*, 72 NY2d 784, 792 [1988]; see *Matter of Mendoza v. New York State Div. of Hous. & Community Renewal*, 123 NYS3d 165 [App Div, 2nd Dept 2020]).

Thus, “contiguous structures constitute a unified regulated multiple dwelling when the ‘indicia of common facilities, common ownership, management and operation . . . warrant treating the housing as an integrated unit’” (*Kelenzon v DeRobertis*, 4 Misc3d 127[A][App Term, 2nd Dept 2004] citing *Salvati v Eimicke*, 72 NY2d 784, 792). “While different combinations of those factors may be present in any given case, no one factor is determinative” and the totality of the evidence must be considered (*Matter of Piazzola*, 124 NYS3d 813 [App Div, 2nd Dept 2020]; see *Matter of Mendoza v New York State Div. of Hous. & Community Renewal*, 123 NYS3d 165, 168; see also *Matter of Bambeck v State Div. of Hous. & Cmty. Renewal, Office of Rent Admin*, 129 AD2d 51 [App Div, 1st Dept 1987]).

Furthermore, in determining horizontal multiple dwelling status, “the buildings’ common facilities should be evaluated as of ‘the date the building or complex first became subject to the RSL’” (*Matter of Mendoza v New York State Div. of Hous. & Community Renewal*, 123 NYS3d 165, 168). It is the owner’s burden to prove at trial its allegation that the apartment is exempt from rent regulation (see *124 Meserole, LLC v Recko*, 2017 NY Slip Op 50686[U][App Term, 2nd Dept 2017]; see also *TJA Realty, LLC v Hermosa*, 56 Misc3d 130[A][App Term, 2nd Dept 2017]). Hence, “[a]djacent structures constitute a regulated horizontal multiple dwelling when, ‘on the date the building first became subject to RSL’ (RSC § 2520.11[d]), there were sufficient indicia of common facilities, common ownership, management and operations to warrant treating the housing as an integrated unit’ ” (*TJA Realty, LLC v Hermosa*, 56 Misc3d 130[A]; citing *Salvati v*

Eimicke, 72 NY2d 784, 792). Thus, “[u]nless otherwise exempt, housing accommodations in buildings built before January 1, 1974 containing more than six units are subject to rent stabilization, and horizontal multiple dwellings are subject to rent stabilization pursuant to the” Emergency Tenant Protection Act of 1974 and the Rent Stabilization Law of 1969 (*TJA Realty, LLC v Hermosa*, 56 Misc3d 130[A]).

It has been held that “[c]ommon ownership is not determinative to establish that separate buildings constitute a horizontal multiple dwelling” (*O’Reilly v N.Y. State Div. of Hous. & Cmty. Renewal*, 291 AD2d 252, 254 [App Div, 1st Dept 2002]; see *Matter of Bambeck v State of Div. of Hous. & Community Renewal*, 129 AD2d 51). It is well settled that even where “the structures share a common block and tax lot or one or more utilities, do not compel an inference of integration” (*Kelenzon v DeRobertis*, 4 Misc3d 127[A]). “The number of units stated in the building’s certificate of occupancy (c of o) is not dispositive in establishing whether that building is part of a horizontal multiple dwelling” (*Matter of Junction Realty LLC v State of New York Div. of Hous. & Community Renewal Off. of Rent Admin.*, 26 Misc3d 1228[A][Sup Ct, Queens County 2010]). “Shared heating is insufficient to establish a horizontal multiple dwelling” (*O’Reilly v N.Y. State Div. of Hous. & Cmty. Renewal*, 291 AD2d 252, 254).

Here, based on the totality of the testimonial and documentary evidence, the Court finds that, although under common ownership, management, and operations, tax lot as well as being contiguous buildings, the Subject Building and the 120-15 Property do not constitute a regulated horizontal multiple dwelling, because they do not share sufficient common facilities and services to warrant treating the housing as an integrated unit as the separate features of the buildings predominate over the common features (*Matter of Mendoza v New York State Div. of Hous. & Community Renewal*, 123 NYS3d 165, 168; *O’Reilly v N.Y. State Div. of Hous. & Cmty. Renewal*,

291 AD2d 252; see *Kelenzon v. DeRobertis*, 4 Misc3d 127[A]; see also *Yahudai v. Lawson*, 2 Misc3d 5 [App Term, 2d & 11th Jud Dists 2003]). Petitioner demonstrated that the Subject Building, the 120-15 Property and the One Family Dwelling did not constitute a horizontal multiple dwelling on January 1, 1974 nor as of a later date.

It is undisputed that the Subject Building and the 120-15 Property were constructed in approximately 1923, pursuant to the New Building Application and Blueprint, and the One Family Dwelling was constructed in approximately 1943, pursuant to the Certificate of Occupancy for the One Family Dwelling. These buildings were conveyed together in the same deed and they have been owned and managed together for several years.

It is undisputed that, for the Subject Building and the 120-15 Property, there are two separate boilers, each serving one building. It is undisputed that, in the Subject Building and the 120-15 Property, there are separate water lines, water meters, sewer lines, gas lines, gas meters, oil tanks, roof line, roof entrance doors, entrance doors, separate basement doors, and separate multiple dwelling registrations (see *Salvati v. Elmicke*, 72 NY2d 784). There are separate addresses for the Subject Building and the 120-15 Property. There are separate electrical meters in the basement of each building and there is a crossline from the 120-15 Property to the Subject Building. The buildings do not have Certificates of Occupancy. Thus, based on the foregoing, the Court finds that Petitioner met his burden of demonstrating that the Subject Premises is not subject to rent regulation and Respondents did not sufficiently refute Petitioner's proof. Therefore, the Court finds that Respondents did not establish their defense that the Subject Premises is subject to rent regulation as a horizontal multiple dwelling.

Warranty of Habitability

Respondent N. Dharmnath asserts a counterclaim for breach of the warranty of habitability. Real Property Law (“RPL”) § 235-b provides that:

“in every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warranties.”

Thus, this statute requires the landlord to maintain an apartment “fit for human habitation;” fit for “the uses reasonably intended by the parties;” and that the occupants will not be subjected to conditions that are “dangerous, hazardous or detrimental to their life, health or safety” (RPL § 235-b; see *Solow v Wellner*, 86 NY2d 582, 587 – 588 [1995]; see also *Park West Mgt. Corp. v Mitchell*, 47 NY2d 316, 325 [1976]).

In this instance, in support of their counterclaim for breach of the warranty of habitability, Respondents presented two undated photographs, one of a mice condition and another of a roach condition, and testimonial evidence regarding additional conditions that existed in the Subject Premises during their tenancy – an unsecured toilet seat, a bathroom vanity condition, and a sink condition. Here, based on the testimonial and documentary evidence, the Court finds that a counterclaim for breach of the warranty of habitability does not constitute a defense to this holdover proceeding; accordingly, it is hereby severed without prejudice (see *78 Havemeyer LLC v Abuzaid*, 2016 NY Slip Op 50238[U][Civ Ct, Kings County 2016]; see also *City of New York v Candelario*, 223 AD2d 617, 618 [App Div, 2nd Dept 1996]).

Conclusion

Accordingly, Petitioner is entitled to a final judgment of possession and warrant of eviction against Respondent Kelly Dharmnath and Respondent Naomi Dharmnath. Petitioner is also entitled to a default judgment of possession and warrant of eviction against "John Doe" and "Jane Doe" subject to proof of their military status and dependency. Petitioner may move on notice for issuance of the final judgment of possession and the warrant of eviction upon the lifting of the COVID19 eviction moratorium and the COVID19 emergency restrictions in accordance with this Decision and Order.

Upon the issuance of the warrant of eviction, the execution of the warrant is stayed 90 days for Respondents to vacate and Respondents are directed to commence in September 2020 payment of ongoing use and occupancy at \$950.00 by the 10th of each month. Upon default, Petitioner may move on notice to accelerate execution of the warrant of eviction.

Petitioner is entitled to a monetary judgment against Respondent Kelly Dharmnath and Respondent Naomi Dharmnath in the amount of \$15,200.00 as the arrears use and occupancy due for September 2017 through January 2019. Respondents are directed to pay \$15,200.00 by October 15, 2020. Upon default, Petitioner may move for a monetary judgment upon the lifting of the COVID19 eviction moratorium and the COVID19 emergency restrictions in accordance with this Decision and Order.

Respondent Naomi Dharmnath's counterclaim for breach of the warranty of habitability is severed without prejudice, and her counterclaim for legal fees is moot and dismissed in accordance with this Decision and Order.

This Decision and Order is without prejudice to any other claims the parties may have against one another.

The foregoing constitutes the Decision and Order of this court, copies of which are being sent to all parties. Upon the reopening of the Courts subsequent to the COVID19 pandemic, the parties are directed to pick up their exhibits within 60 days or they will either be sent to the parties or destroyed at the court's discretion and in compliance with DRP-185 (<http://www.courts.state.ny.us/courts/nyc/civil/directives/DRP/DRP185.pdf>).

Dated: August 20, 2020
Queens, New York



Hon. Malaika Scott-McLaughlin, J.H.C.

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