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| Sherman Realty LLC v Kevelier |
| 2021 NY Slip Op 32041(U) |
| March 9, 2021 |
| Civil Court of the City of New York, New York County |
| Docket Number: L&T 62413/18 |
| Judge: Timmie Erin Elsner |
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART N

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SHERMAN REALTY LLC,

Petitioner-Landlord,

-against-

Index No. L&T 62413/18

GLADYS KEVELIER,

Respondent-Tenant,

DECISION/ORDER

RANDY PEREZ, "JANE" PEREZ, "JOHN DOE"
and "JANE DOE",

Respondents-Undertenants,

PREMISES: Apartment 2D
231 Sherman Avenue
New York, New York

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TIMMIE ERIN ELSNER, J.H.C.

Sherman Realty, LLC ("petitioner") commenced the within holdover proceeding to recover possession of 231 Sherman Avenue, Apt. 2D, New York, New York ("premises") from the rent-stabilized tenant of record, Gladys Kevelier ("respondent"), and occupants of the premises, Randy Perez, "Jane" Perez, "John Doe" and "Jane Doe" (collectively, the "occupants").

PROCEDURAL HISTORY

By notice of petition and petition, dated May 14, 2018, petitioner alleged that the respondent substantially altered the premises by renovating the bathroom without the landlord's prior written consent, constructed an improper partition wall in the living room, and improperly

sublet the premises to the occupants. The petition was supported by a notice to cure and notice of termination, which outlined the work allegedly done in the premises, the defective nature of same and the conditions which remained “uncured” giving rise to the proceeding. The respondent and occupants appeared by counsel and interposed an answer on, or about, January 15, 2019, alleging that the building superintendent, “Felix Sanchez,” performed work in the premises, including construction of the partition wall and that an “outside worker” replaced tiles in the bathroom with Mr. Sanchez’s full knowledge. The respondent and occupants denied demolition or other substantial alteration of the premises. They also alleged that all occupants in the premises were related to the respondent and that she resided with them in the premises. The answer contained a counterclaim for attorneys’ fees.

Following numerous court appearances, the matter was referred to Part N for trial. Testimony was conducted over several days and, ultimately, was delayed for a period of months due to the COVID-19 pandemic. Testimony was finally completed on November 30, 2020.

TESTIMONY

Petitioner’s managing agent, Richard Hill, testified first. Various documents supporting petitioner’s *prima facie* right to commence the proceeding and respondent’s status as a rent-stabilized tenant were admitted through Mr. Hill. He also testified to petitioner’s substantive claims relating to substantial alteration of the bathroom and floor adjacent to same. No testimony was elicited regarding the alleged partition wall or subletting activity. According to Mr. Hill, he was called to the building in August 2015 as water was pouring from the ceiling into the lobby. Upon arrival, he went to the premises which are directly above the lobby and observed the occupant, Randy Perez, and another gentleman in the bathroom. The room was demolished

completely and “looked like a construction zone.” At that time, he took a series of photographs which memorialized the condition of the premises. These photographs were entered into evidence as Petitioner’s Exhibits 5 through 8. According to Mr. Hill, additional water leaks occurred at the end of September 2015 and in January 2016 which were attributable to renovations in the premises.

Petitioner’s Exhibit 5 depicts the entry to a bathroom with construction debris strewn on the tile floor. The edge of a bathtub can be seen with fixtures, tiles, and Sheetrock clearly removed. There is no opening for a showerhead and no evidence of capped pipes. The photograph shows that the door to the room opens away from the bathroom interior and out towards what appears to be a raw wood floor or sub-floor. The doorframe is also depicted along with the mortise and latch. These are on the left side of the doorframe. The door hinges, if depicted, would be on the right. Petitioner’s Exhibit 6 in evidence depicts a bathtub and adjacent walls. Tiles have been removed as there is no evidence the tub was equipped with a shower. The walls above the tile line are green. There is a single handle bath valve and faucet spout. Petitioner’s Exhibit 7 shows the bathroom sink and toilet area. Tiles have been removed from the walls, however the recessed receptacle for toilet paper is depicted. Walls above the tile line are painted green. There appears to be piping in the wall for a sink. Petitioner’s Exhibit 8 depicts a person’s foot and raw flooring as well as a scrap of old carpet.

Petitioner’s next witness was Ramon Feliz. He has been a plumber for 20 years and is employed by Restorative Sewer and Drain. He was called to the subject building on October 1, 2015. Upon entering the building, he observed water leaking into the building lobby. He met the superintendent and the pair went to the second floor to determine the source of the water leak. He knocked on the door to the premises but was unable to gain entry. As a result, he

entered Apartment 2E to try to stop the water flow. At that point, Mr. Feliz determined the water was coming from a broken pipe in the wall between Apartments 2D and 2E. He broke open the wall of a closet in Apartment 2E which was adjacent to the bathroom in the premises. He observed a broken half-inch pipe which fed the bathtub and bathroom sink in the premises. He capped the pipe which supplied hot water to the sink and tub. Water to the D and E lines was shut off and he repaired the cold water pipe. He did not restore hot water to the bathroom in the premises at that time. It was his opinion that “vibration” from construction caused the pipe to break. Petitioner’s Exhibit 9 is Mr. Feliz’s invoice for the work performed.

Mr. Feliz returned to the building on January 16, 2016 to address water leaking into the lobby. He was able to gain access to the premises and saw that the bathroom was still in a state of demolition. He testified that it looked similar to the bathroom depicted in photographs (Petitioner’s Exhibits 5 through 8) previously entered in evidence. At the time of his visit, Randy Perez an occupant, was present along with others working with Mr. Perez. The witness observed that a new toilet had been installed in the bathroom but was lacking a flushometer. He verified that the hot water supply to the bathroom remained capped from his October repair.

As part of the work performed on January 16, 2016, Mr. Feliz installed new copper piping supplying water to the bathroom and kitchen. He verified that, on that day, hot water was supplied to the bathroom for the first time since October 2015. He also installed a flushometer for the new toilet. A January 20, 2016 receipt, which evidenced work done in the premises, was entered into evidence as Petitioner’s Exhibit 10. On cross-examination, Mr. Perez admitted that there are many causes for leaking pipes and that he failed to note the age of the water pipes. The receipt neither mentions the cause of the leaks nor the reason for repairs.

Respondent testified next. Ms. Kevelier testified that she has resided in the building for 20 years, 16 of which were in the premises. She lives with her son, Randy Perez, his wife, Mary Luz and their two children. All five were residing in the premises in 2015 and 2016. Currently, her grandchildren are 4 and 5 years old. From the inception of her tenancy, leaks in the bathroom were a problem. In August 2015, a ceiling leak destroyed the tiles and walls in the sole bathroom in the premises. The respondent advised the superintendent of the problem, but he did not repair same. At that point, she decided to hire a contractor to install new tile, repair the plaster, and paint. She contacted “Jose” and “Pablo,” who were employed as “supers” at “137 Broadway” where respondent worked. After the pair inspected the premises, they agreed to remove existing wall tiles and install replacements. The work took place over a two-day period, during which she was present. Respondent’s Exhibit D was entered into evidence and reflects payment of \$1,600.00 for the work described as well as for polishing the living room floor.

Various photographs (Respondent’s Exhibits C-1 through C-7) were entered into evidence depicting the current condition and layout of the bathroom. These photographs show green tile on the walls, slate-like floor tiles and white painted walls and ceiling. They also depict substantial water damage particularly in the bathtub/shower area. Paint and plaster are hanging from the ceiling and walls. The showerhead is capped and plaster on the wall surrounding same is cracked and peeling. There is paint on the shower curtain rod evidencing that it has been in place for some time. Paint on the bathroom riser is also peeling. There is no evidence of green paint beneath the white surface, the remains of which would readily be discernable if surfaces were painted as depicted in Petitioner’s Exhibits 5 through 8 in evidence. The bathroom door is on the left side of the frame and opens into the room. The frame and hinges are old and appear to have layers of paint consistent with years of use.

According to the respondent, the photographs placed in evidence through the petitioner's agent do not depict the bathroom in the premises. They do not show a window above the toilet or the same bathtub that is in respondent's home. The door is on the opposite side of the frame and opens outward and not inward. Additionally, recesses in the wall for a hamper and toilet paper holder appear in petitioner's photographs. There are no such recesses on the bathroom walls in the premises. Furthermore, respondent disputed that the closet wall of Apartment 2-E was adjacent to the bathroom in the premises.

On cross-examination, respondent admitted that she never mentioned repair issues when entering into stipulations in two petitioner-commenced, nonpayment proceedings in 2014. At that time, she was unrepresented by counsel and did not seek a rent reduction. Respondent had no proof she contacted the building superintendent to notify him of water leaks. Respondent agreed that she did not obtain permission to change the tile in the bathroom, but asserted the work done was cosmetic in nature.

Next to testify was one of the occupants, Randy Perez. He verified that he has lived in the premises for 16 years and his wife has lived there for 10 years. This is the only home his two children have known. They were one- and two-years-old in 2015. According to the occupant, tiles were continually falling off the bathroom walls during his occupancy. The building superintendent changed and repaired tiles two to three times over the years, but they were never properly repaired.

In 2015, as a result of a water leak, bathroom wall tiles fell off and cut his feet. The occupant asked the building superintendent to replace all the wall tiles, but the superintendent indicated that respondents would need to pay a rent increase if he did the work. At that point, the family hired workers to remove the old wall tiles and install new ones. At no point did

workers remove flooring or fixtures and the family was able to use the sink and toilet during the two days work was ongoing. The occupant did not mention repairs in a stipulation signed in connection with a 2014 nonpayment proceeding as he was afraid of a rent increase. The occupant testified that there is a “yard” between Apartments 2D and 2E and their walls are not appurtenant.

Due to the Covid-19 pandemic, trial testimony in this matter was delayed for several months. Following numerous conferences, virtual trial was continued on December 3, 2020. Petitioner produced Mr. Hill as a rebuttal witness. He testified that he observed Randy Perez, an occupant, demolishing the bathroom. As a result of the demolition, the pipes were damaged and leaks continued. Additionally, Mr. Hill observed water on the bathroom floor near the tub and believes this caused damage to the lobby. Mr. Hill was unable to address discrepancies between photographs submitted by each party, but was certain respondent and the occupants damaged the premises.

LEGAL ANALYSIS

It is the petitioner’s burden to prove by a preponderance of the evidence that the respondent breached a substantial obligation of her lease by substantially altering the premises without the petitioner’s prior consent. *See 350 E. 62nd St. Assocs. v Vecilla*, 182 Misc2d 68 [Civ Ct, NY County 1999]; *see also, 1 Bk Street Corp. v Blasinin*, NYLJ, June 30, 1999, p.25, col. 2 [App Term, 1st Dept](holding petitioner failed to prove its case and, thus, was not the prevailing party, where the trial court dismissed a holdover proceeding but characterized the evidence as “equally split 50/50” and “all the parties [were] credible.”) When a landlord has willfully refused to repair habitability impairing conditions, tenants have a right to arrange for those

repairs to be done and then recoup the reasonable cost of those repairs. *See Charles v 751 Union St., LLC*, 65 Misc3d 156(A)[App Term, 1st Dept 2019]; *see also, Katurah Corp. v Wells*, 115 Misc2d 16 [App Term, 1st Dept 1982]. The burden of proof is on the tenant to prove the breach of the warranty of habitability and that the landlord willfully refused to make required repairs. *See Missionary Sisters of Sacred Heart v Meer*, 131 AD2d 393 [1st Dept 1987]; *see also, Katurah Corp. v Wells, supra.*

It is well-settled that the trial court’s credibility-based findings of fact should be affirmed unless incompatible with any fair interpretation of the evidence. *See Thompson v Penthouse Intl.*, 80 NY2d 490 [1992]. To the extent a witness’ testimony conflicts with that of another witness, it simply raises an issue of credibility for the trial court to resolve. *See In Re Sonia*, 70 AD3d 468 [1st Dept 2010](*quoting, Matter of Irene O.*, 38 NY2d 776)]; *see also, Santucci v Govel Welding, Inc.*, 168 AD2d 845 [1st Dept 2003]; and *Charles v 751 Union St., LLC*, 65 Misc3d 156(A)[App Term, 1st Dept](“the determination of a trier of fact as to issues of credibility is given substantial deference, as a trial court’s opportunity to observe and evaluate the testimony and demeanor of the witnesses affords it a better perspective”)

In this instance, petitioner has failed to sustain its burden. First, the petition contains allegations that the respondent illegally sublet the premises. Petitioner failed to produce any evidence supporting this claim and indeed appears to have abandoned same. Likewise, petitioner produced no evidence or testimony supporting claims that an illegal partition wall was constructed in the living room of the premises. The court notes that both the petition and predicate notices are signed by petitioner’s attorney rather than by an agent with direct knowledge. By asserting unsupported claims which are not based in fact, petitioner places its remaining allegations into question.

The testimony of petitioner's witnesses is questionable at best. There is no dispute and, in fact, the verified petition asserts many individuals have occupied the premises from 2015 to date. Mr. Hill testified that the sole bathroom was demolished completely in August 2015. Mr. Feliz affirmed that the sole bathroom in the premises remained demolished and unusable on January 16, 2016 and that the toilet was lacking a flushometer at that time. He also testified that there was no hot water supplied to the bathtub or sink from October 1, 2015 until January 16, 2016. It defies logic that a family, with two toddlers could reside in the premises when its sole bathroom was completely unusable for almost six months. Furthermore, it is implausible that a family of five could utilize a bathroom without hot water for approximately three months. Testimony that vibration from construction caused the pipes to rupture was unsupported by any documentation. Petitioner's witnesses were unable to provide a satisfactory explanation for discrepancies in the layout of the bathroom pictured in photographs they submitted into evidence and respondent's bathroom.

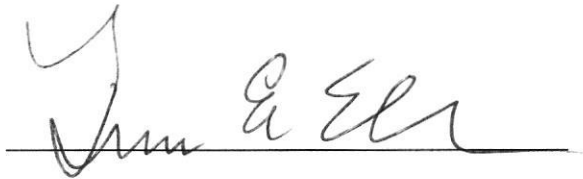
The court credits the testimony of both respondent and occupant, who admitted against their interest that they did not have the permission of petitioner to replace bathroom tiles. They also admitted that they failed to mention repairs while involved in court proceedings because they feared financial repercussions. Photographs, which were entered into evidence, showed extensive damage to the bathroom ceiling and walls caused by serious plumbing leaks. These leaks could have resulted in flooding in the building lobby. The court finds that replacement of wall tiles, painting and plastering a bathroom do not constitute a substantial alteration of the premises as defined by law.

CONCLUSION

Based upon the foregoing, the within proceeding is dismissed with prejudice as to claims relating to illegal subletting, substantial alteration of the premises and construction of an improper partition wall.

This constitutes the order and decision of the court.

Dated: New York, New York
March 9, 2021



Hon. TIMMIE ERIN ELSNER