

<b>Department of Hous. Preserv. &amp; Dev. of the City of N.Y. v 992 Jefferson Ave. LLC</b>
2021 NY Slip Op 32078(U)
May 10, 2021
Civil Court of the City of New York, Kings County
Docket Number: 3350/19
Judge: Michael Weisberg
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CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF KINGS: HOUSING PART

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DEPARTMENT OF HOUSING PRESERVATION  
AND DEVELOPMENT OF THE CITY OF NEW  
YORK,

Index No. 3350/19

DECISION/ORDER

Petitioner,

-against-

Mot. seq. nos. 1 & 2

992 JEFFERSON AVE. LLC; URI  
MERMELSTEIN; EMMA MERCADO; JOSIF  
YUSHUVAYEV,

Respondents.

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WEISBERG, J.:

The following e-filed documents listed by NYSCEF document numbers (motion nos. 1 and 2) 3-5 were read on these motions for civil penalties and for disqualification, and other relief.

This is an action for civil penalties and an order to correct based on heat and hot water violations. HPD and the owner agreed to a consent order on January 15, 2020, in which Respondents agreed to pay civil penalties and to provide heat and hot water to the apartments in the building through the end of the 2019-2020 heat season in accordance with legal requirements. The order further provided that HPD “may seek additional civil penalties for any violation of the terms” of the agreement. HPD has moved for the assessment of civil penalties based on Respondents’ failure to provide heat and hot water as agreed, through March 31, 2020. Respondents have cross-moved for an order disqualifying HPD’s counsel and for other relief.

*Civil Penalties*

HPD is only seeking civil penalties in connection with heat and hot water conditions in two apartments in the building: apartment “2” and apartment “4.” HPD claims that after January 15, 2020, the date of the consent order, Respondents failed to provide heat and hot water on multiple days, thereby violating the terms of the consent order and entitling it to civil penalties. In support of its claim, HPD submits two types of evidence: electronic records of conditions found by its inspectors and emails exchanged between HPD employees and Respondents.

According to the records of conditions found by HPD inspectors as displayed on HPD's website, in February and March 2020, HPD found that Respondents were providing insufficient heat and hot water as follows: on February 10, 2020, insufficient heat and hot water in apartment "2;" on March 16, 2020, insufficient hot water in apartment "4;" and on March 23, 2020, insufficient heat and hot water in apartment "4." None of these conditions had been certified as corrected as of August 24, 2020.

HPD also annexed to its motion copies of email purportedly exchanged between HPD and Respondents. Respondents are correct that no foundation has been laid for the admissibility of the emails. However, because Respondents do not dispute their authenticity, and in fact attempt to rely on the emails themselves in opposing civil penalties, there is no reason not to consider their contents as party admissions. If this were a motion for summary judgment, then HPD might have been required to submit the emails in admissible form, whether Respondents objected to them or not (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [failure to make prima facie showing of entitlement to summary judgment requires denial of motion, regardless of sufficiency of opposing papers]; *but see Rosenblatt v St. George Health and Racquetball Assoc., LLC*, 119 AD3d 45 [2d Dept 2014] [court erred in denying summary judgment on basis of uncertified deposition transcript where opposition did not raise this issue of admissibility]). However, this is not a motion for summary judgment, but rather one for additional relief based on breach of the parties' agreement, as contemplated by that agreement (*cf. City of Poughkeepsie v Nutra-Vet Research Corp.*, 159 AD2d 675 [2d Dept 1990] [imposing additional sanctions as provided for in agreement requiring defendant to remove trailer by a date certain]). Accordingly, as Respondents have effectively conceded the authenticity of the emails, their consideration by the court is not precluded by HPD's failure to submit them in admissible form.

The emails comprise exchanges between HPD and Respondents Mercado and Mermelstein during the period March 16, 2020 and March 28, 2020. At various points Mermelstein or Mercado acknowledge issues with the building's heat and hot water system (the boiler and/or pipes) and detail their efforts to have them corrected (e.g. from March 25, 2020: "I believe it is the thermostat also we are replacing it" and "And a pipe is going to be replaced tomorrow 7 am also we are going to fully drain and refill the boiler that will stop the issues").

New York City Housing Maintenance Code (Administrative Code of City of NY) § 27-2115(k)(1)(i) provides for a presumption that a heat or hot water violation continues after the condition is initially found (*Department of Hous. Preserv. & Dev. Of City of N.Y. v De Bona*, 101 AD2d 875, 875 [2d Dept 1984] [“Imposition of civil penalties acts as a deterrent to these landlords’ failure to comply with the law. The enactment of the presumption of a continuing violation protects the tenants’ rights by removing the onerous burden of proof that the violation existed on every date in question”]). For apartment “2,” this means that the conditions found on February 10, 2020 (insufficient heat and hot water) are presumed to have continued from that date onwards. The same follows for the insufficient hot water condition found in apartment “4” on March 16, 2020, and the insufficient heat and hot water conditions found in apartment “4” on March 23, 2020. As of August 24, 2020, none of the conditions had been certified corrected, as evidenced by their continued existence in the electronic record displayed on HPD’s website.

By the findings of HPD on the dates above alone, HPD has demonstrated that Respondents are in breach of the parties January 15, 2020 agreement.<sup>1</sup> Accordingly, HPD is entitled to civil penalties calculated as follows:

Apartment “2” subsequent heat violation (HMC § 27-2115[k][1][i])<sup>2</sup> February 10, 2020 through March 31, 2020: 49 days when heat was required x \$500.00 = \$24,500.00;

Apartment “2” subsequent hot water violation February 10, 2020 through March 31, 2020: 51 days x \$500.00 = \$25,500.00;

Apartment “4” subsequent hot water violation March 16, 2020 – March 31, 2020: 16 days x \$500.00 = \$8,000.00;

Apartment “4” subsequent heat violation March 23, 2020 – March 31, 2020: 8 days when heat was required x \$500.00 = \$4,000.00;

Total: \$62,000.00.

Were this a motion for summary judgment, the burden would shift to Respondents to produce evidentiary proof in admissible form to establish the existence of a material issue of fact which require a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). “General, conclusory, and

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<sup>1</sup> HPD also argues that because of a heat violation issued for apartment “4” in March 2019 that was still on the violation status report as of August 24, 2020, it is entitled to a presumption that the condition continued up to and after January 15, 2020. However, because a heat violation had issued for apartment “4” in November 2019 and that violation no longer appears on the violation status report, the court finds that no such presumption is warranted.

<sup>2</sup> This provision provides for higher penalties when there is a second violation for the same condition in the building in two consecutive calendar years or heat seasons.

unsubstantiated allegations” would be insufficient to do so (*US 7 Inc. v Transamerica Ins. Co.*, 173 AD2d 311 [1st Dept 1991]). As this is not a motion for summary judgment, then there might be some lesser standard of proof submitted by Respondents that would entitle them to a hearing. Cases such as *City of Poughkeepsie v Nutra-Vet Research Corp.* (159 AD2d 675) and *Anis Realty, LLC v Roman* (56 Misc 3d 128[A], 2017 NY Slip Op 50822[U] [App Term, 2d Dept, 2d, 11th and 13th Jud Dists 2017]) determine the need for a hearing based on a dispute as to the movant’s entitlement to post-settlement relief, but neither discuss the standard applicable when determining whether a hearing is required.

Here, however, Respondents’ opposition is so bereft of evidence that it would fail to require a hearing under not just the standard in a motion for summary judgment, but also a hypothetical lower standard. In his affidavit in opposition to HPD’s motion, Respondent Uri Mermelstein merely denies that there was a lack of heat, hot water, or cooking gas while HPD’s mobile boiler was in operation, denies that Respondents received complaints from tenants, and makes some vague allusions to difficulties caused by COVID-19 and the Department of Buildings. The opposition lacks any specifics and fails to include any supporting evidence. Under these circumstances Respondents have failed to show that there is a factual dispute requiring a hearing. The court has considered Respondents’ other arguments and finds them unavailing.

#### *Disqualification of HPD’s Attorney*

A party seeking disqualification of its opponent’s attorney “carries a heavy burden of identifying the projected testimony of the advocate-witness and demonstrating how it would be so adverse to the factual assertions or accounts of events offered on behalf of the client as to warrant his disqualification” (*Broadwhite Assoc. v Truong*, 137 AD2d 162, 163 [1st Dept 1997] [internal citations omitted]). Respondents have failed to meet this burden. Additionally, as no hearing on the motion is required, disqualification is not warranted (*see id.* [“disqualification is required only where the testimony by the attorney is considered *necessary*”] [emphasis in original]).

*Conclusion*

Accordingly, it is hereby ORDERED that Petitioner's motion is GRANTED as set forth below, ORDERED that Respondents' motion is DENIED, and ORDERED that judgment shall enter in favor of Petitioner and against Respondents, jointly and severally, in the amount of \$62,000.00.

This is the court's decision/order.

Dated: May 10, 2021



**MICHAEL L. WEISBERG  
JUDGE, HOUSING COURT**

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Michael L. Weisberg, JHC