

**Department of Hous. Preserv. & Dev. of the City of  
N.Y. v Rosenfeld**

2021 NY Slip Op 33653(U)

September 8, 2021

Civil Court of the City of New York, Kings County

Docket Number: Index No. HP 300953/2021

Judge: Julie Poley

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CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF KINGS: HOUSING PART B

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

Index Number HP 300953/2021

Petitioner,  
  
*-against-*

**DECISION/ORDER**

J ROSENFELD  
JUDA ROSENFELD  
EAST 95 REALTY LLC,

Respondents.  
-----X

Present:  
**JULIE POLEY**  
**Judge, Housing Court**

Recitation, as required by CPLR 2219(a):

Notice of Motion and Affidavits Annexed.....	1
Order to Show Cause and Affidavits Annexed.....	0
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	4
Stipulations.....	0
Other.....	0

This is an HP proceeding in which Petitioner Department of Housing Preservation and Development of the City of New York (“HPD”) seeks civil penalties and an order to correct based on Housing Maintenance Code (“HMC”) violations which were placed on the property located at 1088 Winthrop Street, Brooklyn, New York 11212 (“premises”). This “hot-water case” is predicated on Violation #13952643 (lack of hot water, Apt. 2B) which issued on or about December 20, 2020.<sup>1</sup> Three days later, on or about December 23, 2020, Respondents

<sup>1</sup> Violation # 13952758 (no access to boiler area) and Violation # 13952759 (insufficient notice relating to access to boiler area) also issued on or about December 20, 2020.

certified the violation as corrected. Thereafter, HPD conducted a re-inspection on or about January 4, 2021, determined that Respondents were still not providing adequate hot water to Apt. 2B, and issue a new violation.<sup>2</sup> On or about January 6, 2021, HPD informed Respondents that they falsely certified Violation # 13952643 (lack of hot water, Apt. 2B). Approximately 2-weeks later, on January 19, 2021, HPD verified the condition was corrected. On or about March 3, 2021, HPD commenced this proceeding seeking civil penalties, along with an order to provide legally adequate hot water, access to the boiler area, and to post proper notices relating to access to the boiler area. Respondents filed an Answer on or about March 16, 2021, which contains five (5) affirmative defenses.

Before the court is Petitioner's motion seeking summary judgment pursuant to CPLR § 3212 and/or CPLR § 409(b), awarding Petitioner \$39,250.00 in civil penalties, and dismissing Respondents' affirmative defenses pursuant to CPLR § 3211(b). In support of summary judgment, Petitioner attaches a Notice of Violation for inadequate hot water in Apt. 2B and a locked boiler room, dated December 20, 2020, and a Notice of Violation for inadequate hot water in Apt. 2B, dated January 4, 2021. (*See*, P. Ex. A). Petitioner also attached a Report of Heat/Hot Water Violations from December 20, 2020 through January 4, 2021. (*See*, P. Ex. B). Also attached is a computer-generated Violation History for Violation # 13952643. (*See*, P. Ex. C). Petitioners' calculations for civil penalties, which total \$39,250.00, are contained in an Affirmation in Support. (*See*, Affir. of M. Gdanski, Esq., dated June 11, 2021, paragraphs 30-35).

Respondents oppose, and submit Affidavits from Isaac Rosenfeld, a managing agent, and from Fatri Mussaj, the superintendent of the premises. Mr. Mussaj avers that on December 20,

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<sup>2</sup> Violation # 13970146 (lack of hot water, Apt. 2B).

2020, the initial date that violations issued, the boiler turned off “for an hour to an hour and a half,” that he was able to restart the boiler that same day, and that he went to Apt. 2B where he measured the water which was approximately 120 degrees based on his thermometer. (*See*, Aff. of F. Mussaj, dated July 14, 2021). Mr. Mussaj also alleges that on January 4, 2021, the HPD reinspection date, the boiler was taken off-line for one and half hours, that tenants were notified of same, and that on January 4, 2021 the boiler was taken on-line again, and he checked with the tenant of Apt. 2B to confirm that the hot water was fine. (*See*, Aff. of F. Mussaj, dated July 14, 2021). Mr. Mussaj also contends that appropriate signage is posted concerning the boiler, and that although the boiler room is locked, the sign has his phone number and indicates that he has a key. Mr. Rosenfeld corroborates the foregoing allegations and asks that the motion be denied, and this proceeding be dismissed. (*See*, Aff. of I. Rosenfeld, dated July 14, 2021).

In reply, HPD argues that Respondents have not attached documentary evidence to their opposition papers and have failed to rebut HPD’s *prima facie* case. HPD also challenges the veracity of the affidavits submitted in opposition to the motion as they are alleged to be contradictory to the certificate of correction filed by Respondents. On July 23, 2021, this Court heard oral argument and reserved decision. All Court appearances took place via Microsoft Teams and all parties are represented by counsel at this time.

To obtain summary judgment, the moving party has the burden of establishing its cause of action or defense sufficiently to justify judgment in its favor as a matter of law. (*See*, CPLR § 3212(b); *Friends of Animals, Inc. V. Associated Fur Mfrs. Inc.*, 390 N.E.2d 298 [1979]). If there is any doubt as to the existence of a triable issue, summary judgment should not be granted. (*Glick & Dolleck, Inc. V. Tri-Pk Export Corp.*, 239 N.E.2d 725 [1968]). As summary judgment is a drastic remedy, “the facts must be viewed in the light most favorable to the non-moving

party.” (*Vega v. Restani Construction Corp.*, 18 NY3d 499, 503 [2012]). “To grant summary judgment it must clearly appear that no material and triable issue of fact is presented.” (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; citing, *Di Menna & Sons v. City of New York*, 301 NY 118 [1950]).

The proponent of summary judgment is required to “make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of material fact.” (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Only upon making of this showing does the burden then “shift to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” (*Id.*)

As a preliminary matter, the Court takes judicial notice of HPD’s violation records, attached as exhibits to the motion and petition, as *prima facie* evidence of proof of the conditions stated therein. (MDL § 328(3); see also, *Dept. of Hous. Preserv. & Dev. of the City of N.Y. v. Knoll*, 120 Misc.2d 813 [App Term, 2<sup>nd</sup> Dep’t 1983] [HPD’s computer database records are *prima facie* evidence of any matter stated therein.]). In addition, the New York City Housing Maintenance Code § 27-2115(k)(1(i) provides there shall be a presumption that a hot water violation continues after the condition is initially found. (See also, *Dept. of Hous. Preserv. & Dev. of City of N.Y. v. De Bona*, 101 AD2d 875 [2<sup>nd</sup> Dep’t 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.”]).

In the case at bar, this means the conditions found on December 20, 2020 (lack of hot water to Apt. 2B, no access to boiler area, and insufficient notice relating to access to boiler area)

are presumed to have continued from that date onwards. To overcome the presumption contained in the HMC, Respondents will need “documentary evidence in the form of a certification of compliance or repair receipts or detailed testimony of repairs being done so as to show when and what repairs were specifically corrected ....” (*Dept. of Hous. Preserv. & Dev. of City of N.Y. v. Deka Realty Corp., et. al.*, N.Y.L.J., June 16, 1992, page 36, col. 6 [App Term, 2<sup>nd</sup> and 11<sup>th</sup> Jud. Dists. 1992], citing *Dept. of Hous. Preserv. & Dev. of City of N.Y. v. Knoll*, 120 Misc.2d 813 [App Term, 2<sup>nd</sup> Dep’t 1983]). The balancing act between the statutory presumption and ensuing burden is justified “since the knowledge of the work, labor and services performed is within the purview of the owner, it is reasonable to place on him, the burden of properly establishing, through his testimony and proof, that the violations listed have been properly corrected.” (*Dept. of Hous. Preserv. & Dev. of City of N.Y. v. Deka Realty Corp., et. al.*, N.Y.L.J., June 16, 1992, page 36, col. 6 [App Term, 2<sup>nd</sup> and 11<sup>th</sup> Jud. Dists. 1992]).

Although HPD’s records are considered *prima facie* evidence, and there is a presumption in favor of HPD’s findings, owners are permitted by statute to raise defenses to civil penalties and can seek to mitigate them. (*See*, HMC § 27-2115(k)(3)). Indeed, the statutory authority which enables HPD to bring this action in the Housing Part to recover civil penalties also provides that owners can raise defenses to civil penalties or make a showing as to why civil penalties should be mitigated. (*See*, HMC § 27-2116). In the case at bar, the Affidavits submitted by Respondents contend that the violations were corrected within the time specified in the notice of violation and that the certificate of compliance was duly filed, which are available arguments to raise in defense or mitigation to civil penalties. (*See*, HMC § 27-2116(b)(1)). Respondents also contend that the violation did not exist at the time the notice of violation was

served, which is another argument that can be raised to defend against or mitigate the imposition of civil penalties. (*See*, HMC § 27-2116(b)(2)).

Where, as here, Respondents have raised defenses to civil penalties and factual issues which could mitigate civil penalties, Respondents should be afforded a full opportunity to raise such defenses and mitigating circumstances at a trial. (*See, Dept. of Hous. Preserv. & Dev. of City of N.Y. v. De Bona*, 101 AD2d 875, 875 [2<sup>nd</sup> Dep't 1984] ["Although civil penalties for the violation run from the date the notice is affixed to the certificate of inspection visits and there is a presumption of a continuing violation, penalties cannot be collected or otherwise enforced, until a judicial proceeding is brought. At this proceeding, the owner may negate the existence of any violation, rebut the presumption of a continuing violation, or otherwise present a defense. Thus, the owner is afforded a full hearing on the merits prior to the deprivation of any property rights [internal citations omitted]."]). As the opposition papers present issues of fact concerning Respondents' defenses and potential mitigating circumstances for civil penalties, a hearing is required to resolve the factual dispute. (*Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc.*, 50 AD3d 1073 [2<sup>nd</sup> Dep't 2008] [hearing must be conducted if a factual dispute exists which cannot be resolved on the papers alone.]). Testimony and cross-examination elicited at trial will afford the Court the opportunity to make determinations concerning these factual disputes, and the trial Court will have the opportunity to weigh the credibility of testimony provided. Therefore, based on the foregoing affirmative defenses, these issues cannot be resolved on papers alone and are ripe to be heard at a trial

The Court now turns to the second prong of Petitioner's motion, which seeks to strike all of Respondents affirmative defenses. Under CPLR § 3211(b), "a party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit."

Petitioner has the burden of demonstrating that the affirmative defense is “without merit as a matter of law.” (*Bank of New York v. Penalver*, 125 A.D.3d 796, 797 [2<sup>nd</sup> Dep’t 2015], *lv to appl dism.* 26 N.Y.3d 1030 [2015]; quoting, *Vita v. New York Waste Servs., LLC*, 34 A.D.3d 559, 559 [2006]). In this context, “the Court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every possible inference.” (*Fireman’s Fund Ins. Co. V. Farrell*, 57 A.D.3d 721, 723 [2008]).

The branch of Petitioner’s motion to strike Respondents’ First and Second Affirmative Defenses (which allege that the violations as pled are defective) is denied. Giving Respondents every reasonable inference, as this Court must, Respondents’ First and Second Affirmative Defenses are preserved for trial. The branch of Petitioner’s motion to strike Respondent’s Third Affirmative Defense (that the underlying violations have been corrected) is also denied and this defense is preserved for trial.

The branch of Petitioner’s motion to strike Respondent’s Fourth Affirmative Defense (inadequate heat caused by open window) is granted. This proceeding is not predicated on a heat violation and the defense has no bearing on this case.

The branch of Petitioner’s motion to strike Respondent’s Fifth Affirmative Defense (that the City Inspector did not wait for the hot water to reach 120 degrees) is granted. Respondents do not allege in their affidavits that they were present when the City Inspector tested the water temperature. The defense as plead is devoid of any facts supporting Respondents’ claim and is therefore stricken.

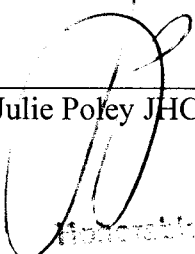
Therefore, for the reasons stated, the branch of Petitioner’s motion for summary judgment is denied, and the branch of Petitioner’s motion to strike Respondents’ Affirmative

Defenses is granted to the extent that Respondents' Fourth and Fifth Affirmative Defenses are stricken. This proceeding is transferred to Part X for trial.

This constitutes the Decision/Order of this Court, which shall be uploaded to NYSCEF.

Dated: September 8, 2021  
Brooklyn, New York

Julie Poley JHC



Honorable Julie Poley