# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

SUSAN MAY TELL

INDEX NO. 158948/2018

MOT. DATE

- v -

MOT. SEQ. NO. 003

FIRSTSERVICE RESIDENTIAL NEW YORK, INC. et al

The following papers were read on this motion to/for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS Doc. No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS Doc. No(s)._____
Replying Affidavits ECFS Doc. No(s)._____

In this action, plaintiff-tenant seeks redress for the removal of a window air conditioning unit in her rent stabilized apartment. Plaintiff now moves for summary judgment: [1] on her first cause of action pursuant to GBL § 352-eeee[4], compelling defendants to reinstall a window air conditioner in her apartment; and [2] on the issue of liability on her second cause of action for attorneys fees and costs, with an inquest on damages.

Defendants FirstService Residential New York, Inc. (FirstService), The Board of Managers of the 275 West 10th Street Condominium (the Board) and The 275 West 10th Street Condominium (the Condominium) cross-move for summary judgment dismissing the complaint and all cross-claims. Defendant Tremada West 10th Street LLC (Tremada) also cross-moves for summary judgment in its favor. Plaintiff opposes the cross-motion by FirstService, the Board and the Condominium but takes no position as to Tremada's cross-motion.

Issue has been joined and the motion as well as the cross-motion by FirstService, the Board and the Condominium were timely brought after note of issue was filed. Meanwhile, Tremada's cross-motion is untimely, as it was brought more than 120 days after note of issue was filed. Nonetheless, an untimely cross-motion for summary judgment may be considered by the court when it is based upon issues raised in a timely motion-in-chief. Since that is the case here, the court will consider Tremada's cross-motion. The court's decision follows.

The relevant facts are largely undisputed. Plaintiff is a rent stabilized tenant in Apartment 11K at 275 West 10th Street, New York, New York (the Building). Plaintiff had a room air conditioner in the window of her apartment from the beginning of her tenancy in 1980 until 2016, when the air conditioner was removed. Plaintiff contends that the air conditioner was removed without her consent and in violation of the lease and the Rent Stabilization Code (RSC).

Dated: 1/27/22

HON. LYNN R. KOTLER, J.S.C.

**1. Check one:** ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION

**2. Check as appropriate: Motion is** ☒ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

x/m m/ss

**3. Check if appropriate:** ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

In 2014, the Building was purchased by non-party 277 West 10 Owner LLP (Sponsor) and converted into defendant Condominium. Defendant FirstService was the Sponsor's managing agent, and later, the managing agent of defendant Board.

On January 21, 2015, FirstService held a tenants' meeting to discuss the purchase of the Building and the upcoming reconstruction plans. The Sponsor adopted a non-eviction plan for Condominium conversion. To date, plaintiff remains a non-purchasing tenant, choosing not to become a unit owner. Plaintiff received a letter from FirstService, dated August 6, 2015, which stated that in conjunction with the reconstruction, and specifically in connection with the replacement of windows, portable air conditioners would be installed, replacing window air conditioners in the apartments. Plaintiff opposed this plan, arguing that Sponsor failed to obtain approval from the New York State Division of Housing and Community Renewal (DHCR) for the removal of said air conditioners in rent-stabilized apartments.

The 8/6/15 Letter provides in relevant part as follows:

> In conjunction with the window replacement project, we will be providing residents with portable air conditioners. These units will, not only, be more energy efficient but will also cool quicker. When the windows are removed, the existing window units must also be removed. The building will no longer allow AC units to protrude outside of the windows.

Plaintiff and other rent-stabilized tenants in the Building hired an attorney and objected to the plan to remove the window air conditioners. Plaintiff took the position that the window replacement and replacement of her window air conditioner with a portable air conditioner constituted the loss of a required service and a reduction of services under the Rent Stabilization Code and therefore declined to grant the Sponsor access to her apartment to make the changes.

During the reconstruction, a series of floods occurred in plaintiff's apartment, rendering it uninhabitable. Thereafter, plaintiff left the tenant group and hired her own counsel, while working out temporary living accommodations until her apartment was remediated. Plaintiff claims that when she returned to her apartment in November 2016, her window air conditioner had been removed without her consent.

Plaintiff has still refused to have a portable air conditioner installed in its place and to date, there is no air conditioning in her apartment. Plaintiff explains in her sworn affidavit why she does not want a portable air conditioner:

> At least some of the tenants in the Building accepted portable air conditioners in exchange for monetary compensation. I did not. I am on the eleventh floor with an unobstructed southern exposure. Other rent stabilized tenants have, variously, different sized apartments, more rooms, on different apartment lines in the building, on lower floors, and without relentless direct sun light. My apartment gets direct sunlight forcing me to keep the blinds closed when it is warm.
>
> For thirty-five years I was able to leave my room air conditioner running during the hottest times of year without any issue. A portable air conditioner would prevent me from leaving the apartment for more than a few hours at a time, leaving me effectively tethered to the apartment or risk significant damage to my collections as has been the case for what has now been four summers. My ability to travel for shooting and displaying my photography has been impacted as well as my ability to visit friends out of town

In an affidavit by an officer of the Sponsor, Yoseph Manor, which has been submitted to the court, the circumstances surrounding the swap to a portable air conditioner is explained as follows:

> Pursuant to the building's renovation plan relayed to tenants in August of 2015, the windows were replaced and the existing window air conditioning unit was replaced with a brand new portable air conditioning unit with venting sleeve while plaintiff was residing at her temporary apartment.
>
> The DeLonghi Pinguino PAC N120E portable air conditioning unit that plaintiff was provided with at no charge was the same portable air conditioning unit provided in the other fourteen rent-stabilized units as a replacements (sic) for the old window air conditioning units. The DeLonghi Pinguino PAC N120E portable air conditioning unit is superior to the then existing air conditioning unit as it not only provides cool air, but it also dehumidifies and purifies the air. This model does not require the emptying of any buckets of condensation; is significantly quieter than a window unit; and is easily movable from the living room to the bedroom due to its durable wheel assembly.

On November 21, 2017, the ownership of plaintiff's apartment was transferred to defendant Tremada. Since her return to her apartment, plaintiff has sought to have her window air conditioner reinstalled. Tremada was willing to allow said conditioner be reinstalled, but neither the Board nor FirstService have approved the decision or attempted to reinstall the air conditioner. According to plaintiff, FirstService controls access to the Building and has refused to have the window air conditioner reinstalled.

In her complaint, plaintiff's seeks injunctive relief, specifically the prevention of the installation of a portable air conditioner in her apartment and the reinstallation of the window air conditioner. She also seeks attorney's fees. Plaintiff argues that air conditioning is an essential or required service, as stated in RSC. In the annual registration statements filed by her owner with DHCR, as required by law, among the services expressly provided is "room air conditioning." Plaintiff argues that during a condominium conversion, all parties involved are obliged to abide by the terms and conditions of a rent-stabilized lease such as hers.

Plaintiff contends that the unauthorized removal of a room air conditioner constituted a reduction of an essential service and the replacement with a portable air conditioner would be no substitute. According to plaintiff, the lack of a room air conditioner has had a major impact on her use and enjoyment of the property. Plaintiff contends that the relief she seeks is necessary because of the inadequacy of damages in this situation. With respect to attorney's fees, plaintiff argues that she is entitled to them, referring to the terms in her lease, section 234 of RPL and Article 14.5 of the Condominium By-Laws.

FirstService, Board and Condominium cross-move for dismissal of the complaint on the ground that plaintiff does not have a cause of action against them. They argue that air conditioning is not an essential service as it is not expressly provided as one in the lease. They also argue that there is no evidence of a reduction of services since the replacement of the room air conditioner with a portable air conditioner would represent an upgrade of services. Defendants contend that their actions did not violate any codes or laws. Finally, these defendants maintain that plaintiff has no contractual or statutory entitlement to attorney's fees.

Tremada cross-moves separately for dismissal on the ground that it is not opposed to plaintiff's suit, and supported plaintiff's efforts to have the window air conditioner restored in her apartment. Plaintiff, in her papers, does not take a position on Tremada's cross motion, but opposes the other cross motion, arguing that RSC strongly upholds air conditioning as an essential service, despite the lack of an express provision in the lease.

FirstService, Board and Condominium oppose Tremada's cross motion, arguing that Tremada is a necessary party, since the court ordered plaintiff to include Tremada as an additional defendant in this action.

**DISCUSSION**

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

In her complaint, plaintiff alleges that for a rent-stabilized tenant, the unauthorized removal of a room air conditioner constituted a violation of the RSC and constitutes a drastic reduction of a required service. Plaintiff cites 9 NYCRR 2520.6 [r] [1], which defines required services in a non-exhaustive list as follows:

> That space and those services which the owner was maintaining or was trying to maintain on the applicable base date set forth below, and any additional space or services provided or required to be provided thereafter by applicable law. These may include, but are not limited to, the following: repairs, decorating and maintenance, furnishing of light, heat, hot and cold water, elevator services, janitorial services removal of refuse.

An owner must file an application to decrease or modify/substitute required services. Pursuant to 9 NYCRR 2522.4 [d]:

> An owner may file an application to decrease required services for a reduction of the legal regulated rent on forms prescribed by the DHCR on the grounds that:
>
> (1) the owner and tenant, by mutual voluntary written agreement, consent to a decrease in dwelling space, or a decrease in the services, furniture, furnishings or equipment provided in the housing accommodation; or
>
> (2) such decrease is required for the operation of the building in accordance with the specific requirements of law; or
>
> (3) such decrease results from an approved conversion from master metering of electricity, with the cost of electricity included in the rent, to individual metering of electricity, with the tenant paying separately for electricity, and is in amounts set forth in a schedule of rent reductions for different-sized rent stabilized housing accommodations included in Operational Bulletin 2003-1...

Upon the finding of a reduction in service, DHCR will order a rent reduction pursuant to statutory formulas (RSL § 26-513; *see i.e. Hyde Park Assoc. v. Higgins*, 149 Meanwhile, an owner may file an application to modify or substitute required services, not changing the legal regulated rent, upon grounds that:

> (1) the owner and tenant, by mutual voluntary written agreement, consent to a modification or substitution of the required services provided in the housing accommodation; or

> (2) such modification or substitution is required for the operation of the building in accordance with the specific requirements of law; or
>
> (3) such modification or substitution is not inconsistent with the RSL or this Code. No such modification or substitution of required services shall take place prior to the approval of the owner's application by the DHCR, except that a service modification or substitution pursuant to paragraph (2) of this subdivision may take place prior to such approval.

Further, pursuant to 9 NYCRR 2522.5 [6], upon a condominium conversion, "the services which shall be required to be maintained under this code with respect to housing accommodations which remain subject to this code shall not be diminished or modified without the approval of the DHCR as provided for in section 2522.4(d) or (e) of this Part."

Under the original lease, the services provision specifically provided the following services: "(1) elevator services, (2) hot and cold water in reasonable amounts, and (3) heat as required by law." The Rider attached to the lease, which referred to required services for rent-stabilized tenants, provided the following:

> The owner may not decrease services which were provided or required on the date the apartment first became subject to the Rent Stabilization Law or which were added or required after that date. Required services include building-wide services such as heat, hot water, janitorial services, maintenance of locks or security devices, and repair and maintenance, and may include elevator, air conditioning and other amenities.

While the lease does not expressly include air conditioning as a service, the submission of annual Registration statements by the owner to DHCR, as required by law, indicates that the owner acknowledged room air conditioning as a specific apartment service. Specifically, the statements provide as follows: "Apartment services: Stove; Refrigerator; Blinds/Shades; Room Air Cond."

The court finds that based on the evidence, air conditioning was a required service. However, the court disagrees with plaintiff that she has established that the switch from a window air conditioner to a portable air conditioner constitutes a reduction or even a modification/substitute in required services.

Plaintiff complains in her affidavit about the heat in her apartment in the summer. This situation was created by her own choice to refuse the portable air conditioner that defendants have offered to provide to her. To the extent that plaintiff argues the replacement of a window air conditioner with a portable air conditioner constitutes a reduction in required services, the court disagrees. All defendants are required to provide to plaintiff is some form of air conditioning. If, by way of example, plaintiff had been offered a fan instead of a portable air conditioner, there would be no dispute that a fan would constitute a reduction in services. Here, however, plaintiff was offered a different type of device that would cool her apartment off in the summer and has refused that offer.

Plaintiff's affidavit fails to establish what is insufficient about a portable air conditioner. Plaintiff's claim that a portable air conditioner would prevent her "from leaving the apartment for more than a few hours at a time, leaving [her] effectively tethered to the apartment or risk significant damage to [her] collections" is unfounded and defies logic. Plaintiff fails to substantiate, or even explain, how a portable air conditioner cannot be left to operate unattended or how its operation could cause damage. This is a motion for summary judgment, and plaintiff is required to lay bare her proofs in order to demonstrate a *prima facie* cause of action or avoid dismissal of her complaint by raising a triable issue fact. Plaintiff's submissions to the court are wholly insufficient to meet either burden.

Even if the Sponsor and/or defendants should have filed an application with DHCR before plaintiff's window air conditioner was removed, plaintiff has chosen to litigate her claims in this forum, and there-

fore waived her right to have the DHCR adjudicate her claim (see decision/order dated July 31, 2019 and defendants' motion to dismiss and/or transfer this action to DHCR). Relatedly, while this court acknowledges that the DHCR typically makes determinations regarding what constitutes a required service and whether there has been a reduction, modification or substitution of a required service, plaintiff commenced this plenary action because she sought injunctive relief rather than remuneration.

Indeed, plaintiff admits that monetary relief would not make her whole, and even refused to accept a portable air conditioner in exchange for monetary compensation. Thus, at best, the court finds that the switch from a window air conditioner to a portable air conditioner was only a modification of required services and would not warrant a reduction in rent. Otherwise, plaintiff is not entitled to an order directing the defendants to install a window air conditioner. The Condominium and its Board were entitled to replace the windows in the building, and relatedly, choose a plan which did not permit air conditioners to jut out from the façade. The court will not direct the defendants to not provide her with a portable air conditioner, since it is her right to refuse same, as she has done for five years now. Therefore, such relief is unnecessary. Nonetheless, plaintiff may now request a portable air conditioner, since the court does find that air conditioning is a required service.

In light of this result, plaintiff's motion for summary judgment is denied and the defendants' motions are granted. Plaintiff's failure to demonstrate a reduction in required services necessarily renders her second cause of action for attorneys fees and costs unavailing. Plaintiff has not prevailed in this action.

**CONCLUSION**

In accordance herewith, it is hereby:

**ORDERED** that plaintiff's motion for summary judgment is denied, the defendants' cross-motions for summary judgment are granted, plaintiff's complaint is dismissed and the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 1/27/22
New York, New York

So Ordered:

**Hon. Lynn R. Kotler, J.S.C.**