720 Riverside Owners Corp. v Bowen
2022 NY Slip Op 34702(U)
June 17, 2022
Civil Court of the City of New York, New York County
Docket Number: Index No. L&T 78539/17
Judge: Anne Katz

IVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: TRIAL PART R

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720 RIVERSIDE OWNERS CORP.,

Petitioner-Landlord,

-against-

EUGENE BOWEN AND SEAN FARROW,

Respondents-Tenants.

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Index Number L&T 78539/17

DECISION AND ORDER

Hon. A. Katz:

The above captioned nonpayment proceeding was commenced by Notice of Petition and Petition dated October 26, 2017. The Petition demanded $7, 270.00 as all arrears through October, 2017 for the premises located at 720 Riverside Drive, Apartment #7, New York, New York 10031 ("premises"). The premises are subject to the Rent Stabilization Law of 1969 as amended. On November 11, 2017, respondents submitted a *pro se* "Notice of Answer" which alleged, in relevant part, as follows: that part of the rent demanded in the Petition was paid; that petitioner was estopped pursuant to a Settlement Agreement accepted by petitioner; that petitioner breached the warranty of habitability; and laches. Respondents also counterclaimed for negligence, constructive eviction and legal fees.

The proceeding initially appeared on the Part C calendar on November 21, 2017. The proceeding was adjourned numerous times and on or about June 20, 2018, respondents moved to amend their *pro se* Answer to include that the rent demanded exceeded the legally allowable rent for the premises. Prior to a decision on the *pro se* motion to amend, respondents, by counsel, again moved to amend their Answer to include the following: that the rent demand failed to provide a good faith estimate of the arrears due; that petitioner failed to properly register the premises; that the collection of rent was barred by accord and satisfaction; and that petitioner sought an illegal rent and thereby they were the subject of an overcharge.

After oral argument, respondents' motion to amend was granted by Decision and Order dated May 22, 2019. On November 7, 2019, the Court also issued a Decision and Order which precluded petitioner from introducing evidence not provided to respondents during pre-trial discovery. The proceeding was transferred to Part R on November 7, 2019 and a Pre-Trial Conference was held. The trial was scheduled for February 13, 2020 and adjourned to March 19, 2020. Due to the onset of the coronavirus pandemic, the trial did not commence until October 12, 2021 and continued on March 1, 2022 and March 2, 2022. The parties submitted Post Trial Memorandum of Law on March 28, 2022.

Petitioner's Case

By Stipulation dated September 17, 2020 the parties agreed to the following facts:

1. Petitioner is the owner of the building located at 720 Riverside Drive, New York, New York.
2. The building is a registered multiple dwelling currently registered with DHPD, registration number 111978.
3. The premises is subject to rent stabilization, as amended, and is currently registered as a regulated unit with the DHCR
4. Since the inception of respondents' tenancy, they have tendered $19,530.00 in rent.
5. There is a landlord-tenant relationship between the parties pursuant to a lease dated March 1, 2017.
6. The premises were rented for residential purposes.
7. The respondents remain in possession of the premises.

By Stipulation dated September 17, 2020 the parties also agreed to the following exhibits:

1. The Deed (P1).
2. HPD Property Registration Form (P2).
3. Rent Stabilized Lease, between petitioner and respondents. dated March 1, 2107 (P5)
4. Lease Renewal dated November 7, 2017 (P6).
5. Check for $102,000.00, from petitioner to AF Contracting Services, dated March 8, 2017 received pursuant to subpoena (P9).
6. Correspondence dated April 29, 2017, from Eugene Bowen to Phil Landau, which requested an additional set of keys to the premises and repairs (RB).
7. Correspondence dated July 3, 2017, from respondents to petitioner, advising petitioner they were to withhold rent due to petitioner's failure to timely replace lost keys, failure to perform repairs and address alleged incorrect rental arrears (RC).
8. Correspondence dated September 5, 2017, about respondents desire for an abatement and to address ongoing repairs and alleged incorrect alleged arrears (RD).
9. Respondents pictures (RE-RH)
10. Correspondence dated March 19, 2017, from Eugene Bowen to Phil Landau, about repairs (RK).
11. Correspondence dated November 16, 2018, from Eugene Bowen to Phil Landau, about an emergency leak and additional repairs (RL).
12. Correspondence dated January 5, 2020, from Eugene Bowen to Phil Landau, which alleged black mold in the bathroom (RM).
13. NYC Department of Buildings Job Overview (RP).
14. NYS Department of State-Division of Corporations document which reflected that AF Contracting Services was inactive by a "Dissolution by Proclamation/Annulment of Authority on Jul 27, 2011 (RQ).
15. Pictures of the premises (RR)

16. HPD Building Inf. of Violations Report, dated September 14, 2020, which contained an "A" violation for a window sash; "B" violation for broken or detective plastered surfaces and a "C" violation for roach infestation at the premises (RU).
17. Respondents pictures (RV)

Respondents' Case

Respondents' first witness was Josh Frankel ("Frankel") who has been employed by petitioner since the 1990's and oversees the affairs at the building. Frankel testified that prior to respondents entering into their lease, the prior lease contained a monthly rent of $1,220.67. Frankel was shown the DHCR Rent Roll which also showed the legal regulated rent for the premises at $1,220.67 and the increase to $3,100.00 (P3). Frankel alleged the rent increase was due to an 18% vacancy increase ($219.72) and a longevity increase ($146.48) which was exclusive of the Individual Apartment Improvements (IAI's) performed at the premises. Frankel testified that a gut renovation was performed at the premises which he personally oversaw. According to Frankel, the work was performed by AF Contracting Services ("AF") and included new walls and ceilings, new electricity, and new plumbing. A review of the bill submitted by AF (P8) reflected that the renovations cost $102,000.00. Frankel stated the bill did not contain a breakdown of labor or materials but included the new appliances. Frankel alleged that he was not sure if he received an estimate or AF paid the out of pocket expenses but generally, bills are received after the work is performed. When shown the check for $102, 000.00, from petitioner to AF (P9), Frankel stated he was not familiar with the check since it was too many years ago.

Next, Frankel was shown the NYC DOB Overview for the building which indicated that no work permits were issued by the DOB (RP). Frankel admitted that, upon his reading the document, no work permits were issued and he had no personal knowledge of any permits. According to Frankel, petitioner had no mechanism to ensure work permits are issued. When questioned as to the corporate status of AF (RQ), Frankel testified that they were deemed inactive because AF failed to file a tax return but alleged they had insurance. Frankel stated he has no personal affiliation with AF and that he believed the price charged was "reasonable" or "lower" and that he paid AF for the job on March 8, 2017.

Frankel stated that he is responsible for the calculation of rents at the building which include the premises. When asked why he calculated respondents' rent to be $3,100.00, he stated that he thought that was the most that petitioner could collect. Frankel alleged that respondents signed the rent calculation in their lease (P5) and he identified their signatures. According to Frankel, it is his custom to ask tenants to sign off on the last page of the lease. Lastly, Frankel alleged that Phil Landau ("Landau"), the manager at the building, handles all repairs and complaints and arranges for repairs to be performed including extermination services.

Respondents' next witness was Eugene Bowen ("Bowen"). Bowen testified that he moved into the premises with Lashawn Farrow ("Farrow") and when he moved in, Frankel only gave him a two page lease with no calculations or anything regarding improvements. Bowen stated that when he moved into the premises they "looked nice" and things were "generally fine" with the exception

of loud clanging noises from the radiator and the kitchen windows. Bowen testified that he left numerous messages with Landau about the repairs but received no response. Bowen testified he also reached out to Landau by email (RB) to inform him that the bell and buzzer were inoperative and the shower curtain bar in the master bathroom was not attached. Bowen was shown (RB1), a video of the bathroom, which depicted mold on the caulking. Bowen testified that when he sent Landau the picture, Landau's response was that respondents caused the mold by their use of a loofah sponge although, he did not inspect. Bowen stated he also sent Landau correspondence dated July 3, 2017, which advised him that respondents were going to withhold rent due to petitioner's failure to timely replace lost keys, make repairs and address alleged incorrect rental arrears (RC), but he received no response. Therefore, they began to withhold rent to gain the attention of petitioner. Bowen testified that he also sent his correspondence dated September 5, 2017 (RD), by certified mail, return receipt requested, which again raised the issues of on-going repairs as well as new repairs. (RN). Bowen also testified that his correspondence (RK), again informed Landau of multiple repairs which needed to be addressed that included the outlet, loose kitchen tiles and roaches (RN)(RO). Bowen also sent correspondence to Landau (RL) to advise petitioner of an emergency leak in the 3rd bedroom due to a leak from the radiator. Through Bowen, respondents submitted into evidence, an HPD Building Inf. of Violations Report, dated September 14, 2020 (RU). The report contained one "A" violation for a window sash; one "B" violation for broken or detective plastered surfaces; and one "C" violation for roach infestation at the premises. Bowen alleged these conditions were not corrected and he and Farrow personally took care of the infestation.

The Court took judicial notice of three stipulations between the parties which set up access dates for repairs. Bowen stated that he took off between two to four weeks of work and petitioner's workers only showed up once and the conditions still exist. Bowen stated that he and Farrow used self-help for the infestation and bought mouse traps and they caught two mice. Respondents submitted a picture of the traps and mice into evidence (RE) and stated the mice were "disgusting" and they needed to clean and rewash everything. Through Bowen, respondents also entered (RF) and (RG) into evidence to show a leak and peeling paint. Bowen alleged that the peeling paint had not been corrected through the date of trial, that the windows that did not work and the ceiling buckled, Bowen stated that the ceilings are still the same. Bowen alleged that petitioner's response to his letter to withhold rent, was that petitioner was going to commence a non-payment proceeding.

Respondents produced a subpoenaed rent check (front and back) from September 5, 2017 in which they paid $4,495.00 with the memo that read," all rent money owed through Sept 17 cashing this check constitutes agreement per enclosed letter" (RI). The back of the check showed that it was cashed on September 11, 2017. Respondents also offered a subpoenaed rent check (front and back) from October 10, 2017 into evidence which contained a memo line which read "Total rent owned for 10/17 per uncontested 15% reduction" (RJ). The back of the check showed it was cashed on October 18, 2017.

On cross examination, Bowen testified that they moved into the premises on March 1, 2017 and his first lease for the premises had a monthly rent of $3,100.00. According to Bowen, the last

time a rent payment was made was in October, 2017. Petitioner showed Bowen pictures, of the premises (P10A, H, J, L, N, P and Q) in which the premises was in near perfect condition. However, Bowen testified that the towel rod in the bathroom (10H) falls down and that he was not sure if the pictures of the kitchen (P10P & Q) were of the premises as the cabinets were not over the sink, the counter was not as long and the floor looked "sort of the same". Bowen also stated that although the initial lease looked like his, on his copy the owners signature was in a different place.

On redirect examination, Bowen stated that when he first moved into the premises, the clanging noise from the radiator existed and it still exists, especially in the winter. Bowen also stated when he first moved into the premises, a magnet was missing from the closet door and it did not close. Bowen alleged that the appliances (P10A) were "cheap" and claimed that his copy of the lease was missing a third signature as well as information about rent history and improvements.

The next witness to testify was Lashawn Farrow a/k/a "Sean Farrow" ("Farrow"). Farrow alleged that he moved into the premises, with Bowen, in March, 2017 and his lease did not contain prior rent history or improvements. According to Farrow, the conditions at the premises include the following: loud clanging noises from the radiator; infestation of mice, cockroaches and ants; defective windows; mold in the bathroom; defective radiators throughout; lack of heat in his bedroom when he first moved in; inoperable buzzer; and defective baseboards. According to Farrow, the clanging noise still exists, the radiators are still defective, the buzzer does not work, the elevator does not function properly, and the ceiling looks like it is going to collapse during heavy rain. Farrow alleged that the petitioner has not responded to the repair issues despite being put on notice. Farrow also stated that petitioner was nonresponsive when he attempted to obtain a replacement key and it took several months to obtain one. During the time that he did not have a replacement key, Farrow alleged he would wait for people to go in or out of the building and if no one walked in or out, he would "crash with friends or others". Lastly, Farrow stated he could not enjoy the premises based upon the infestation, which was disgusting, especially when it came to food and cooking, although he admitted that despite the existence of the alleged conditions he signed a renewal lease.

According to Farrow, Bowen was responsible for advising petitioner of the repairs and he had no personal contact with petitioner. Farrow said that petitioner never advised him on how to obtain a new key, that there is only one intercom which does not consistently operate and that he had allowed the exterminator into the premises.

After Farrow completed his testimony respondents rested.

Petitioner's Rebuttal Case

On rebuttal, petitioner recalled Frankel. Frankel testified he has been employed by petitioner for thirty five years and has overseen the premises since Petitioner's purchase of the building. According to Frankel, the building has 72 or 78 units and Bowen and Farrow reside in unit 7F. Frankel testified that the rent for the prior tenant of record at the end of 2015 was $1,220.67 (P3) and once the tenant vacated, petitioner performed a gut renovation. Frankel alleged that petitioner ripped out the kitchen, bathrooms, floors and wall to the studs, put in new electricity, lighting, and

sheetrock and everything was brand new. Petitioner entered (P10A-P) into evidence which depicted the renovations and included new stainless steel appliances. Frankel reviewed the check for $102,000.00, from petitioner to AF(P9) and noted the memo read for "7F" for work performed. According to Frankel, petitioner relied on the invoice from AF to figure out the costs of the work and that he negotiated the contract, gave approval for the work, and that he authorized payment. Frankel alleged the renovations were performed in 2017 just prior to respondents moving in.

Frankel testified that rent in respondents' initial lease (P5) reflected the vacancy increase and IAI's to the premises and respondents were personally provided with the rider and he had them sign the front page and back page. Frankel testified that page two included the total IAI's, page three was not signed but page eleven was (P11).

Frankel testified that when a repair complaint is made, he goes to the building to inspect. He reiterated that the premises was new and stated there are monthly and/or bi-monthly exterminations for which he puts a note above the mailboxes to inform the tenants the days the exterminator will show. Frankel alleged that the exterminators knock on every door, there is no reason to sign up, petitioner pays the exterminator a flat rate, and payment is not based upon the number of apartments exterminated. Frankel stated that the exterminators are charged with eliminating both rodents and bugs. Frankel also testified that the exterminators spray the common areas including the compactor rooms and trash. With regard to respondents lost key, Frankel testified that when a key fob is lost, petitioner stops that key fob and issues a new one that cannot be duplicated for security reasons. Frankel testified that respondents first emailed him and requested two new keys and then they indicated they lost a key and they were issued a new key.

Frankel testified that the rent for the premises is comparable to the other units at the building that are the same size. Petitioner, through Frankel, submitted an updated rent ledger into evidence (P12) which reflected that respondents owe $174, 608.00 through March 2022.[1]. According to Frankel, Respondents made two payments through the lockbox and petitioner does not see those checks.

On cross-examination, Frankel stated that on the rent check (RJ) where respondents took a 15% abatement, was made to the lockbox and could not be rejected and with regard to rent check (RI) that payment, with the memo line "all rent" also went to the lock box, which payment could not be rejected and petitioner never saw those notations. On cross examination, Frankel also admitted that the initial lease submitted as (P5) did not contain a rider and in Petitioner's Notice to Admit they also only attached a two page lease. Frankel alleged he provided respondents with the DHCR rider although it was not a part of the lease (P5) and that the last page was signed and he made a mistake when he did not have respondents sign on page 3. Frankel stated that Bowen signed the lease in front of him and his signature on the last page is proof. He denied that the rider was produced for trial.

Frankel restated that he did not remember if there was a contract or estimate for the renovations, that the bill was sent to petitioner after the work was done, and that he paid the bill after the work was done. Frankel alleged that he does not pay the bill per item, rather he makes one payment at

[1] The rent ledger submitted was subject to cross examination.

the end. Frankel stated that the contractor, Avi Friedman (AF) is deceased but he was previously used because he had good insurance.

On redirect examination, Frankel stated that respondents' check (RI), was sent to the lockbox and had no endorsement on the back of the check

The last witness on redirect examination was Hikmet Ozgur ("Ozgur") who has been self-employed in the maintenance/construction industry for the past 7 years. Ozgur stated that seven years ago he did the sheet rock, floors, doors, bathroom, kitchen , plumbing, spotlights, painting and molding at the premises. Ozgur testified that he spent two and a half months on the job and worked with one other person. Ozgur stated that he had a construction license but not a plumbing or electrical license. Ozgur stated he worked for AF and did not have ownership in the company. According to Ozgur, his wife handles his finances and he did not know if he was paid weekly and/or how he was paid. Ozgur stated that AF purchased the materials and he did not know how much the work cost. Ozgur said that he had a corporation but no longer does and is self-employed. Although the NY State Dept. of Inspection lists Ozgar's name as "Alcock Corp", he stated that Alcock is closed. Lastly Ozgur stated he was not paid to testify.

Application of Law to Facts

a. Legal Rent

This Court finds that petitioner is barred from collecting any increase to the legal rent based upon its failure to provide respondent's with the requisite DCHR rider at the inception of their tenancy. *RSC§2522.5*, entitled Lease agreements, sets forth the requirement a landlord must meet when issuing a vacancy lease. *RSC §2522.5(1)* states, in relevant part,…an owner shall furnish to each tenant signing a vacancy or renewal lease, a rider which describes the rights and duties of owners and tenants as provided for under the *RSL* including a detailed description of how the rent was adjusted from the prior lease. The rider is required to be attached as an addendum to the lease and for vacancy leases, *RSC§ 2522.5(c)(1)(i)* requires the rider to include a notice of the prior legal regulated rent, if any, which was in effect immediately prior to the vacancy, an explanation of how the rental amount provided for in the vacancy lease has been computed above the amount shown in the most recent annual registration statement, as well as the prior lease, and a statement that any increase above the amount set forth in such registration statement is in accordance with the adjustments permitted by the Rent Guidelines Board and *RSC. §2522.5(c)(1)(ii)* also requires the rider to set forth that the tenant, may, within 60 days of the execution of the lease, require the owner to provide the documentation which supports the detailed description regarding the adjustment of the prior legal rent.

Based upon the testimonial and documentary evidence adduced at trial, this Court believes that petitioner proved that the renovations took place. Frankel testified that he oversaw the renovations, and the bill for the renovations and provided proof of the bill and payment for the renovations. Frankel also offered pictures which showed the premises in mint condition. Bowen's own testimony was that when he moved into the premises everything looked nice and things were generally fine with the exception of the radiator and window. Accordingly, this Court believes that petitioner was entitled to the legal vacancy and longevity increases along with the appropriate

increases for the IAI's. However, despite Frankel's testimony that he provided Respondent's with the rider, it is evident that petitioner did not comply with the requirements pursuant to *RSC §2522.5. 2*. Bowen credibly testified that when he moved into the premises, Frankel only provided him with a two page lease with no calculations or IAI's. Farrow also credibly testified that when he and Bowen moved into the premises they signed the lease which did not provide information of the prior rent or improvements. According to Farrow, the first time that he learned of the prior rent and IAI's was the commencement of this proceeding. Respondents' testimony is made more credible in light of the fact that petitioner never provided with rider to this Court during discovery, with its Notice to Admit nor on the first day of trial, despite a subpoena to produce the entire tenant file. The rider only appeared on the second date of trial, and this, despite the preclusion order from November 7, 2019 which stated the petitioner was barred from introducing evidence not disclosed during discovery.

Despite the lease (P5), the Notice to Admit and the preclusion order, on the second day of trial petitioner offered the 11 page rider and testified that the rider was given to the respondents at the inception of their tenancy. A review of petitioner's exhibits attached to the Notice to Admit, in which it asked respondents to confirm the two page lease as true and accurate corroborates that petitioner failed to provide the rider with the initial lease. Moreover, as stated above, respondents issued a subpoena to petitioner, which required petitioner to bring a complete copy of the tenant file to trial and on the first day of trial petitioner appeared with the two page lease. An examination of the rider undercuts the credibility of the document as page three of the document, which discloses the new rent and requires the tenant's certification that they received the document contemporaneously with the lease signing, was not signed by respondents or petitioner and page three which reflected the vacancy increase and IAI's was not signed. Although Frankel stated that the last page of the document, page 11 was signed, a review of the document reflects that only Bowen signed page 11 which contains no information about the legal rent or IAI's.

For the reasons recited herein, the rider was precluded from being admitted into evidence and petitioner may not rely on it to justify the $3,100,00 rent. Even if there was no preclusion order, this Court would give no weight to the alleged rider as it was not timely produced, nor properly signed. Accordingly, this Court finds petitioner is not entitled to collect any adjustments at this time as *RSC §2522.5(c)(3)* reads, in relevant part....where a tenant is not furnished with a copy of the lease rider pursuant to paragraph (1), the notice pursuant to paragraph (2), or the documentation required on demand by paragraph (1)(ii) of this subdivision, the owner shall not be entitled to collect any adjustments in excess of the rent set forth in the prior lease. However, once the rider is furnished, such shall result in the elimination, prospectively, of such penalty.

b. Willful Overcharge

Based upon the testimony and evidence provided herein, this Court does not find that petitioner willfully overcharged respondents. While, as held above, petitioner did not prove that it provided respondents with the rider, in accordance with the *RSC*, that alone is a violation of law and does not constitute fraud. *Sandlow v. 305 Riverside Corp, 201 AD3d 418, 159/ NYS3d 415 (App Div 1st Dept. 2022).* Furthermore, as stated above, this court believes that testimony and documentary evidence sufficiently established that petitioner performed a gut renovation at the premises.

Petitioner proffered the invoice and check which showed payment of the sums charged and referenced it was for work performed at the premises. The pictures submitted reflected the premises as new and the testimony of Bowen confirmed that when he moved into the premises "looked nice" and "were generally fine" with the exception of the windows and radiator. Accordingly, petitioner correctly believed that the rent increase was permissible based upon the vacancy increases and IAI's performed and this is not a case where treble damages should be awarded. *Matter of Nagobich v. New York State Div. of Hous. & Community Renewal, 200 AD2d 388, 606 NYS2d 190 (1st Dept 1994)(citing Matter of Round Hill Mgt. Co. v. Higgins, 177 AD2d 256, 575 NYS2d 842 (1st Dept 1991).* Moreover, it is a truism in overcharge litigation that there can be no showing of overcharge without the actual payment of rent by the tenant. *In the Matter of the Administrative Appeals of Clafin Apartments, LLC and Tanasha King, Rent Administrator's Docket No. E0610050R (DHCR Order April 26, 2019)(Appendix A).*The rent ledger submitted into evidence indicates that any payments made by respondents, that were in excess of collectible rent, were applied toward arrears and should not result in a finding of overcharge as the ledger demonstrates that respondents were in arrears as of May 2017, less than three months after they moved into the premises. Accordingly there has been no willful overcharge.

c. Breach of the Warranty of Habitability and Abatement

To establish the breach of the warranty of habitability, respondents must show that there were conditions at the premises which rendered them uninhabitable, that respondents notified petitioner of the conditions or that petitioner otherwise knew of them, that respondents provided petitioner with a reasonable opportunity to cure the conditions but did not cure and that the conditions had a quantifiable negative impact on respondents use of the premises. *Furnished Dwellings LLC v. Households Headed by Women Inc., 62 Misc3d 864, 867, 92 NYS3d 542, 545 (Civ Ct NY 2007); Liberti v. Fitzpatrick, 1 Misc3d 134 (A), 781 NYS2d 625 (App Term 2nd Dept 2003).* In this proceeding, it is clear that respondents met all four elements to establish the breach of warranty of habitability. Bowen and Farrow's testimony was that when they moved into the premises there were loud clanging noises from the radiator and the windows were defective. The testimony was also that were problems with the bell and buzzer, the shower curtain bar in the master bathroom and mold in the bathroom. Bowen alleged that petitioner did not respond to requests for repairs and with regard to the mold, petitioner blamed the mold on respondents. Bowen also testified that there was an infestation of mice and rodents, defective outlet, and loose kitchen tile floors, leaking and peeling paint and an emergency leak from the radiator, a closet door did not work, the appliances were cheap and lack of heat in Farrow's bedroom. Farrow also alleged that he lost his keys and it took months for him to receive new keys. Respondents entered pictures and letters to petitioner about the repairs into evidence and testified that they informed petitioner they were going to withhold rent due to petitioner's inaction. Lastly, respondents submitted the HPD Violations Report, dated September 14, 2020 (RU), into evidence, which contained an "A" violation for a window sash; "B" violation for broken or detective plastered surfaces and a "C" violation for roach infestation at the premises (RU).

Although respondents have shown a breach of the warranty of habitability has occurred, upon a review of the repairs, this court believes that most of the repairs complained of were *de minimus.* While respondents testified about the conditions still exist at the premises, the violation report of

2020, only listed one A violation for the window, one B violation for the plastered surfaces and one C violation for the roach infestation. The broken floor tiles and shower rod, "cheap appliances and missing magnet on the closet door were also *de minimus* repairs and although respondents alleged the mold was black mold, they offered no testimony or evidence as to the accuracy of this allegation or that any attempt to clean the bathroom was ineffective. Additionally, with regard to the radiator noise, such is part and parcel of living in old buildings in New York City. Although the radiator noise may be annoying, it does not constitute a breach of the warranty of habitability. The real issues were with regard to the key replacement, broken intercom and the rodent infestation as recorded in the HPD violation report. Notably, the HPD report did not contain a violation for rodents and respondents pictures and testimony only showed they caught two mice. Moreover, although respondents did self-help with regard to the mouse traps, they did not address whether they were home when the exterminator knocked on every door on the dates indicated in the notice by the mailbox. Although respondents alleged that this was "disgusting" and they had to wash the premises, such does not greatly affect the use of the premises. Based upon the following, this Court grants respondents a ten percent abatement.

d. Accord and Satisfaction

Accord and satisfaction will only be found were there exists a "clear manifestation of intent by the parties that the payment was made, and accepted, in full satisfaction of the claim. *TIAA Glob. Invs., LLC v. One Astoria Square LLC, 127 AD3d 75, 7 NYS3d 1 (1st Dept 2015).* Essential to a showing of accord and satisfaction is a knowing acceptance by the creditor of a lesser amount. *Consol. Edison Co. of New York v. Jet Asphalt, 132 AD2d 296, 303, 522 NYS2d 124, 129 (1st Dept 1987*). Although respondents wrote checks which stated that acceptance of the check constituted a waiver of full payment, respondents submitted these checks to a lock box. Petitioner credibly testified it did not see the check,. Therefore as respondents have failed to prove that petitioner consented to the discharge of the rent and being that petitioner did not see the check, there was no manifest or knowing waiver and the doctrine of accord and satisfaction cannot be applied here.

e. Conclusion

Respondents owe petitioner as follows:

1. $1,220.67 (last rent prior to tenants move in) x 61 months (3/17-3/22)= $74,460.87
2. MINUS 10% abatement ($7,446.88)=$67,013.99
3. MINUS $19,530.00 (amount paid by respondents)=$47,483.99

Final Judgment of possession and money Judgment in the amount of $47,483.99 in favor of petitioner against respondents. This is without prejudice to any sums that have become due and owing since the date of trial; issuance and execution of the warrant of eviction stayed five (5) days. This constitutes the Decision and Order of this Court.

Dated: New York, New York
June 17, 2022

Hon. Anne Katz, J.H.C.