

**Ulrich v 765 Riverside LLC**

2022 NY Slip Op 34866(U)

June 15, 2022

Civil Court of the City of New York, New York County

Docket Number: Index No. 301280/2021

Judge: Jack Stoller

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This opinion is uncorrected and not selected for official publication.

CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: HOUSING PART R

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CLAIRE ULRICH, et al.,

Petitioners,

Index No. 301280/2021

-against-

765 RIVERSIDE LLC,

DECISION/ORDER

Respondents.

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Present: Hon. Jack Stoller  
Judge, Housing Court

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

Pages	numbered
Order To Show Cause and Supplemental Affidavits and Affirmation Annexed	1, 2, 3, 4, 5 <sup>1</sup>
Notice of Cross-Motion and Supplemental Affidavits and Affirmation Annexed	6, 7, 8, 9
Affirmation In Reply	10

Upon the foregoing papers, the Decision and Order on this motion are as follows:

Claire Ulrich and other tenants, the petitioners in this proceeding (“Petitioners”), commenced this proceeding against 765 Riverside LLC and other entities (“Respondents”), seeking an order to correct violations at 765 Riverside Drive, New York, New York (“the subject premises”). The parties settled this matter with a so-ordered stipulation that, *inter alia*, required Respondents to engage in the work necessary to remove violations from the subject premises. Petitioners now move to hold Respondents in civil contempt. Respondents cross-move by a notice of cross-motion dated May 6, 2022 to extend the time to complete the work. The Court resolves these motions by this order.

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<sup>1</sup> Petitioners purported to file a “supplemental affidavit” on NYSCEF, but this affidavit was filed after the date for service specified in the order to show cause, so it is not considered in this motion.

The stipulation, so-ordered on September 21, 2021 (“the Stipulation”), mandated that Respondents complete work to correct violations related to façade repairs on or before December 31, 2021 and that Respondents complete major structural work in the sub-basement on or before January 31, 2022. The Stipulation also required Respondents to correct all HPD and DOB violations on or before January 31, 2022 and further provided that Respondents shall not be held liable for contempt for any repair work that is not completed unless the failure to repair or do the work constitutes a violation of, *inter alia*, the Housing Maintenance Code or the Building Code. The Stipulation provided that Respondents may move for an extension of “the deadline” prior to the expiration of “the deadline” on a showing of reasonable diligence and that the delay was beyond Respondents’ control.

Petitioners show evidence of violations placed by the New York City Department of Buildings (“DOB”) and the Department of Housing Preservation and Development of the City of New York (“HPD”) remaining outstanding as February 11, 2022 and March 22, 2022, respectively, beyond the dates in the Stipulation. Respondents do not dispute that violations are outstanding.

Civil contempt requires a determination that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect; that the contemnor disobeyed that order; that the contemnor knew of the Court’s order; and the disobedience defeats, impairs, impedes, or prejudices the rights or remedies of a party. El-Dehdan v. El-Dehdan, 26 N.Y.3d 19, 35 (2015), Bd. of Dirs. of Windsor Owners Corp. v. Platt, 148 A.D.3d 645, 646 (1st Dept.), *leave to appeal dismissed*, 30 N.Y.3d 986 (2017). The date certain in the Stipulation by which Respondents had to correct violations demonstrates that the so-ordered Stipulation was an unequivocal order. Respondents knew of the Stipulation, as they entered into it. People ex rel. Stearns v. Marr, 181

N.Y. 463, 470 (1905), Tishman Constr. Corp. v. United Hispanic Constr. Workers, Inc., 158 A.D.3d 436, 437 (1st Dept. 2018). Respondents did not obey the Stipulation. The failure to correct violations of housing and building codes prejudices tenants as a matter of law. Brown v. 315 E. 69 St. Owners Corp., 11 Misc.3d 1069(A)(Civ. Ct. N.Y. Co. 2006), *citing* Various Tenants of 446-448 W. 167th St. v. N.Y.C. Dep't of Hous. Pres. & Dev., 153 Misc.2d 221, 222 (App. Term 1st Dept. 1992). Petitioners have therefore proven, as a prima facie matter, contempt with regard to the mandate of the Stipulation directing that Respondents correct violations.

Once a movant establishes a knowing failure to comply with a clear and unequivocal mandate, the burden shifts to the alleged contemnor to refute the movant's showing, or to offer evidence of a defense, such as an inability to comply with the order. Toranzo v. Toranzo, 185 A.D.3d 621, 623 (2<sup>nd</sup> Dept. 2020). Respondents assert in opposition that they did not timely comply with the Stipulation in part because they had to sue the owner of the building neighboring the subject premises for access, in part because the Landmarks Preservation Commission has not approved façade work yet, and in part because they could not do the work during the winter.

Where a contemnor does not ask for and does not receive additional time within to comply with a Court order, an inability to comply with an order is not available as a defense. Diorio v. City of Peekskill Common Council, 13 A.D.3d 523, 525 (2nd Dept. 2004). While Respondents cross-move for that relief herein, they did not do so until after the dates certain set forth in the Stipulation and after Petitioners already moved for contempt. The Stipulation required that Respondents move for such relief *before* the deadlines contained therein. Even without such a provision in a stipulation, once the court has issued a valid order, it is not for the

recipient of that order to fashion its own remedy, N.Y.C. Coal. to End Lead Poisoning v. Giuliani, 248 A.D.2d 120, 121 (1st Dept. 1998), waiting until called to task and then, for the first time, inform the court of its difficulties in complying with the order. N.Y.C. Hous. Auth. v. Porter, 40 Misc.3d 41, 42-43 (App. Term 2nd Dept. 2012). Upon Respondents' discovery of additional problems with the subject premises, "it was incumbent upon [Respondents] to advise the court immediately of [their] inability to comply with the order." Id. Respondents' failure to timely move for an extension is particularly striking given that an engineer avers in support of Respondents' cross-motion that Respondents can complete the work "several months into the next year", at the very least one year later than the deadline the parties stipulated to and at least three times as long as the time the parties originally stipulated that the work would take. Not only do Respondents fail to show a defense to contempt, then, but to the extent that the only point of extending deadlines to complete the work is to forestall contempt relief, Respondents' cross-motion similarly lacks merit.

The Stipulation also required Respondents to provide full elevator coverage every day from 8 a.m. to 2 a.m. from Monday to Saturday and that Respondents shall post a staffing sheet for the elevator with a point of contact if the elevator was not staffed during those hours. Petitioners submit affidavits from two of the Petitioners detailing a number of specific dates and times on which Respondents did not provide full elevator coverage. In opposition, Respondents' agent avers that four employees service the elevator.

Once a movant for contempt establishes a knowing failure to comply with a clear and unequivocal mandate, the burden shifts to the alleged contemnor to refute the movant's showing. Wel-Made Enters., Inc. v. Mid Island Redi-Mix, Inc., 81 A.D.3d 717, 718 (2<sup>nd</sup> Dept. 2011). An alleged contemnor only raises a fact issue necessitating a hearing if the papers in opposition raise

a factual dispute that was unresolvable from the papers on the motion. *Id.* The fact proposition propounded by Petitioners, that no one was available to operate the elevator on numerous discrete dates and times, is not inconsistent with an averment that employees were assigned to do that work. Indeed, Petitioners themselves annexed Respondents' employees' schedules, which accords with Respondents' agent's affidavit. The key distinction is that the assignment of employees does not necessary mean that employees fulfilled that assignment. Indeed, one of Petitioners averred that she observed that employees were not making themselves available as required by the work schedule. Respondents' agent had no apparent personal knowledge of the whereabouts of Respondents' employees during the dates and time that Petitioners specifically-identified that service to the elevator was not available. Accordingly, Respondents do not raise a colorable fact dispute requiring a hearing as to whether they obeyed the Stipulation with regard to the elevator.

However, as noted above, one of the elements of contempt is that noncompliance with an order prejudices the rights of a party. *El-Dehdan, supra*, 26 N.Y.3d at 35, *Bd. of Dirs. of Windsor Owners Corp., supra*, 148 A.D.3d at 646. Respondents' opposition to the motion raises a fact issue as to the extent of prejudice to Petitioners insofar as the opposition posits that the subject premises has another elevator that Petitioners can use. Accordingly, a hearing is needed on that one element of contempt to the extent that Petitioners seek contempt relief for disobedience with so much of the Stipulation as concerned the elevator.

At oral argument of this motion, the Court discussed with counsel the possibility of bifurcating a hearing, reserving for a separate hearing regarding Petitioners' damages. Given the narrow scope of the dispute over liability for contempt, however, the Court finds it more appropriate to adduce evidence for both at the same hearing.

Accordingly, it is

ORDERED that the Court grants the motion of Petitioners to the extent of holding Respondents in contempt for defaulting on so much of the Stipulation as required correction of HPD and DOB violations, and it is further

ORDERED that the Court grants the motion of Petitioners to the extent that the Court finds that Petitioners proved every element of contempt for defaulting on so much of the Stipulation as it mandated Respondents to staff the elevator in the subject premises, except for the element of prejudice, and it is further

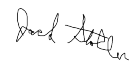
ORDERED that the Court denies Respondents' cross-motion, and it is further

ORDERED that the Court will calendar this motion for a hearing, limited solely to whether Respondents' failure to staff the elevator prejudiced Petitioners and limited to proof of Petitioners' damages, and it is further

ORDERED that the Court will contact counsel to calendar a hearing, limited as outlined above.

This constitutes the decision and order of this Court.

Dated: June 15, 2022  
New York, New York



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HON. JACK STOLLER  
J.H.C.

APPROVED  
JSTOLLER , 6/15/2022, 6:10:40 PM